No. 15-1503
Vide 15-1504

Title:	Charles S. Turner, et al., Petitioners v. United States
Docketed:	June 14, 2016
Linked with 15A988	
Lower Ct:	District of Columbia Court of Appeals
Case Nos.:	(12-CO-1362, 12-CO-1538, 12-CO-1540, 12-CO-1541, 12-CO-1542, 12-CO-1543)
Decision Date:	June 11, 2015
Rehearing Denied:	January 14, 2016

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Mar 23 2016	Application (15A988) to extend the time to file a petition for a writ of certiorari from April 13, 2016 to May 13, 2016, submitted to The Chief Justice.
Mar 24 2016	Application (15A988) granted by The Chief Justice extending the time to file until May 13, 2016.
Apr 27 2016	Application (15A988) to extend further the time from May 13, 2016 to June 10, 2016, submitted to The Chief Justice.
Apr 27 2016	Application (15A988) granted by The Chief Justice extending the time to file until June 10, 2016.
Jun 10 2016	Petition for a writ of certiorari filed. (Response due July 14, 2016)
Jul 7 2016	Order extending time to file response to petition to and including August 15, 2016.
Jul 14 2016	Brief amici curiae of Former Prosecutors filed.
Jul 14 2016	Brief amicus curiae of Innocence Network filed.
Aug 11 2016	Order further extending time to file response to petition to and including September 14, 2016.
Sep 8 2016	Order further extending time to file response to petition to and including October 14, 2016.
Oct 14 2016	Brief of respondent United States in opposition filed. VIDED.
Nov 1 2016	Reply of petitioners Charles S. Turner, et al. filed.
Nov 2 2016	DISTRIBUTED for Conference of November 22, 2016.
Nov 16 2016	Record Requested.
Nov 18 2016	Record received from the D.C. Court of Appeals. The records are electronic.
Nov 21 2016	DISTRIBUTED for Conference of December 9, 2016.
Dec 14 2016	Petition GRANTED limited to the following question: "Whether the petitioners' convictions must be set aside under Brady v. Maryland, 373 U.S. 83 (1963)." The petition in 15-1504 is granted and the cases are consolidated and a total of one hour is allotted for oral argument.
Jan 24 2017	Joint motion to deem the court of appeals' joint appendix as supplemental volumes to the joint appendix filed with this Court filed. VIDED.
Jan 27 2017	Joint appendix filed. VIDED.

Jan 27 2017	Brief of petitioners Charles S. Turner, et al. filed.
Feb 3 2017	SET FOR ARGUMENT on Wednesday, March 29, 2017. VIDED
Feb 3 2017	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. VIDED.
Feb 3 2017	Brief amicus curiae of Center on Wrongful Convictions of Youth filed. VIDED.
Feb 3 2017	Brief amicus curiae of The Innocence Network filed.
Feb 3 2017	Brief amici curiae of Texas Public Policy Foundation, et al. filed. VIDED.
Feb 3 2017	Brief amici curiae of Former Prosecutors filed. VIDED.
Feb 3 2017	Brief amicus curiae of Wilfredo Lora filed. VIDED.
Feb 3 2017	Brief amicus curiae of Cato Institute filed. VIDED.
Feb 7 2017	Application (16A792) to file a consolidated respondents brief on the merits in excess of word limits, submitted to The Chief Justice. VIDED.
Feb 9 2017	Application (16A792) to file a consolidated respondents brief on the merits in excess of word limits granted by The Chief Justice. The consolidated brief on the merits may not exceed 22,500 words. VIDED.
Feb 21 2017	Motion to deem the court of appeals' joint appendix as supplemental volumes to the joint appendix filed with this Court GRANTED. VIDED.
Feb 22 2017	CIRCULATED.
Feb 27 2017	Brief of respondent United States filed. VIDED. (Distributed)
Mar 1 2017	Motion for divided argument filed by petitioner Russell L. Overton. VIDED.
Mar 17 2017	Motion for divided argument filed by petitioner GRANTED.
Mar 17 2017	Reply of petitioners Charles S. Turner, et al. filed. VIDED. (Distributed)
Mar 29 2017	Argued. For petitioners in 15-1503: John S. Williams, Washington, D. C. For petitioner in 15-1504: Deanna M. Rice, Washington, D. C. For respondent: Michael R. Dreeben, Deputy Solicitor General, Department of Justice, Washington, D. C. VIDED.
Jun 22 2017	Adjudged to be AFFIRMED. Breyer, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Thomas, Alito, and Sotomayor, JJ., joined. Kagan, J., filed a dissenting opinion, in which Ginsburg, J., joined. Gorsuch, J., took no part in the consideration or decision of the cases. VIDED.
Jun 26 2017	Letter from the United States received.
Jul 24 2017	MANDATE ISSUED.
Jul 24 2017	JUDGMENT ISSUED.

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AND
RIEFS

15-1503

No.

Supreme Court, U.S.
FILED
JUN 10 2016
OFFICE OF THE CLERK

In the Supreme Court of the United States

CLIFTON E. YARBOROUGH, CHRISTOPHER D. TURNER, KELVIN D. SMITH, CHARLES S. TURNER, LEVY ROUSE, & TIMOTHY CATLETT,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI OF CLIFTON E. YARBOROUGH, CHARLES S. TURNER, CHRISTOPHER D. TURNER, KELVIN D. SMITH, LEVY ROUSE, AND TIMOTHY CATLETT

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QUESTIONS PRESENTED

1. Whether, under *Brady* v. *Maryland*, 373 U.S. 83 (1963), courts may consider information that arises after trial in determining the materiality of suppressed evidence.

2. Whether, in a case where no physical evidence inculpated petitioners, the prosecution's suppression of information that included the identification of a plausible alternative perpetrator violated petitioners' due process rights under *Brady*.

PARTIES TO THE PROCEEDING

Petitioners Clifton E. Yarborough, Christopher D. Turner, Kelvin D. Smith, Charles S. Turner, Levy Rouse, and Timothy Catlett were joined in the proceedings below by Russell L. Overton, one of their co-defendants at trial. Mr. Overton is petitioning this Court separately for a writ of certiorari to review the judgment of the District of Columbia Court of Appeals in this case.

The United States of America is the respondent.

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In the Supreme Court of the United States

No.

CLIFTON E. YARBOROUGH, CHRISTOPHER D. TURNER,
KELVIN D. SMITH, CHARLES S. TURNER,
LEVY ROUSE, & TIMOTHY CATLETT,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI OF CHARLES S. TURNER, CLIFTON E. YARBOROUGH, CHRISTOPHER D. TURNER, KELVIN D. SMITH, LEVY ROUSE, AND TIMOTHY CATLETT

Clifton E. Yarborough, Christopher D. Turner, Kelvin D. Smith, Charles S. Turner, Levy Rouse, and Timothy Catlett respectfully petition for a writ of certiorari to review the judgment of the District of Columbia Court of Appeals in this case.

OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals (App., *infra*, 1a-78a) is reported at 116 A.3d 894. The order of the District of Columbia Court of Appeals denying en banc and division rehearing (App., *infra*, 79a-80a) is unreported. The opinion of the Superior Court of the District of Columbia denying petitioners' motions to vacate their convictions or for a new trial (App., *infra*, 81a-131a) is unreported.

JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on June 11, 2015. A petition for panel and division rehearing was denied on January 14, 2016. On April 27, 2016, Chief Justice Roberts extended the time within which to file a petition for a writ of certiorari to and including June 10, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a)-(b).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law[.]

STATEMENT

This case involves the withholding of evidence in one of the District of Columbia's most infamous murder cases, the 1984 robbery, sodomy, and murder of Catherine Fuller, a 48-year old mother. Petitioners were among a large group of teenagers and young men prosecuted for the crime. Yet no physical evidence tied petitioners to the crime. The prosecution's case at trial relied instead on supposed eyewitnesses—other teenagers with serious credibility problems. Petitioners have always main-

tained their innocence, and nearly all of the living witnesses have recanted.

Through years of investigation and discovery, petitioners learned that the prosecution withheld extensive information favorable to the defense. First, the prosecution withheld multiple eyewitness accounts identifying two potential alternative perpetrators. One of those alternative perpetrators was James McMillan, who has since committed a chillingly similar crime just three blocks from the alley where Mrs. Fuller was murdered. Multiple witnesses stated McMillan was at the crime scene and acting suspiciously until he fled when the police arrived. Within a month, he was imprisoned for robbing and assaulting two other middle-aged women in the neighborhood. Only two months after McMillan was released from prison for those crimes, he beat, sodomized, and murdered another woman in the same neighborhood. Second, the prosecution withheld statements from multiple witnesses suggesting that Mrs. Fuller was not murdered in a group attack, including several who were in the alley close to the estimated time of death and did not encounter a large group. And, third, the prosecution withheld evidence further impeaching the already weak testimony of the witnesses on whom its case depended.

In denying relief, the District of Columbia Court of Appeals declined to consider McMillan's subsequent sodomy-murder in evaluating the materiality of McMillan's presence at the crime scene because that crime occurred after petitioners' trial. In so holding, the court deepened a split of authority on whether courts may consider information arising after trial in determining the materiality of suppressed evidence. Because the decision below deepened a preexisting conflict and is incorrect, the petition for certiorari should be granted.

Moreover, this case further presents an egregious violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963), and thus the due process rights of a group of vulnerable young men in a trial that would determine the course of their lives. With or without consideration of McMillan's subsequent crime, the three categories of withheld evidence would no doubt have cast petitioners' trial in a "different light." *Kyles* v. *Whitley*, 514 U.S. 419, 435 (1995). The District of Columbia Court of Appeals' decision is flatly inconsistent with *Kyles* and other decisions of this Court on the materiality standard for *Brady* claims. The Court's intervention is required to ensure that lower courts correctly apply, and prosecutors faithfully adhere to, the requirements of *Brady*. The petition for a writ of certiorari should therefore be granted.

A. Background And Trial Proceedings

1. At approximately 6:00 p.m. on October 1, 1984, Catherine Fuller was found dead in a garage in an alley near 8th and H Streets N.E. Mrs. Fuller had been badly beaten and forcibly sodomized with an object. Her body was in a corner, just one or two feet away from two sides of the garage and near an upright shoeshine box. Pets. C.A. Br. 10;[1] see App., *infra*, 4a. As one long-time investigator of the case remarked, it is "hard to convey, * * * years later, the impact Catherine Fuller's murder had on Washington." Patrice Gaines, *A Case of Conviction*, Wash. Post, May 6, 2001, at F1.

The police never recovered the object used to sodomize Mrs. Fuller or any physical evidence that could

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[1] References to Petitioners' Court of Appeals Brief are references to the Brief of Appellants Clifton Yarborough, Charles Turner, Levy Rouse, and Timothy Catlett.

identify the perpetrator. The "break" in the investigation did not occur until late November, when a detective interviewed Carrie Eleby about an unrelated nightclub fight. Ms. Eleby was sixteen, intellectually disabled, and a PCP user. While being questioned, Ms. Eleby spontaneously volunteered that she knew who had killed Mrs. Fuller. At the detective's request, she came to the police station the next day to give a full statement, in which she claimed that Calvin Alston had confessed to her. She also brought along a friend, Kaye Porter, who stated that she too had heard the confession. Pets. C.A. Br. 4a, 19a; see also App., *infra*, 6a. As would become customary, both Ms. Eleby and Ms. Porter received vouchers for payments for speaking with the police. Pets. C.A. Br. 18.

Based on Ms. Eleby and Ms. Porter's statements, police arrested Mr. Alston. After hours of intense questioning by detectives who admit that they screamed at Mr. Alston, slammed their hands on desks, and claimed they knew Mr. Alston was guilty and encouraged him to help himself by turning on others, Mr. Alston gave a videotaped statement to police in which he described a group assault that was inconsistent with the physical evidence. App., *infra*, 12a-13a, 15a n.11. Most notably, Mr. Alston described Mrs. Fuller being assaulted in an area of the garage that was occupied by a trash cart and covered in debris. Pets. C.A. Br. 20-21 (citing evidence in record and diagrams of crime scene). No physical evidence of the assault was located there; and the unrebutted expert testimony adduced during petitioners' post-conviction proceedings is that Mrs. Fuller was assaulted in another corner of the garage, where her body was found. Police then arrested four individuals that Mr. Alston named in his statement—Mr. Yarborough, Mr. Catlett, Mr. Overton, and Christopher Turner. All of those names came from a list the police shared with Mr. Alston

of young men who often hung around the block where Mrs. Fuller was killed. *Id.* at 20-21.

The same detectives then questioned Mr. Yarborough, a high school student with intellectual disabilities, without a lawyer or guardian present. At the end of the interrogation, Mr. Yarborough gave a videotaped statement in which he claimed to witness the murder, again describing an attack inconsistent with the physical evidence as well as with Mr. Alston's statement. Pets. C.A. Br. 21-23 (citing evidence in record). For example, he described the assault not taking place in the garage at all, but instead in the alley. This too was inconsistent with the physical evidence and unrebutted scientific testimony. *Ibid.* The other individuals arrested that day maintained their innocence.

On February 6, 1985, police detained Harry Bennett. And, like Mr. Alston and Mr. Yarborough, Mr. Bennett eventually gave a videotaped statement in which he described a group assault that diverged from the undisputed scientific facts of what took place. He, for example, claimed that it had been sunny that day, when it was undisputed that it had been raining, and his description of the sodomy was inconsistent with the physical evidence. Pets. C.A. Br. 23-24 (citing evidence in record).

The interrogations in this case were by and large conducted by two detectives who admit to yelling at the young men and threatening them that they would be the only people charged unless they "c[a]me clean and fingered others." App., *infra*, 15a n.11. They also admitted to playing "good-cop-bad-cop," which to them included one detective feigning such rage at one of the teenagers (Mr. Yarborough, the high school student with intellectual disabilities) that his partner pretended to lead him out of the room. The detective then yelled and banged on the door, demanding to be let back in. And, when he

was, the detective pretended to still be so enraged that he "either pretended to or actually did tear off his t-shirt for dramatic effect." *Id.* at 68a.

2. A grand jury in the District of Columbia ultimately indicted thirteen individuals, including petitioners, for the murder of Mrs. Fuller. Mr. Bennett and Mr. Alston, who had given taped confessions after harsh interrogations, pleaded guilty to reduced charges in return for their testimony against the other defendants. The trial for another defendant, James Campbell, was severed. The cases against the remaining ten defendants proceeded to trial. App., *infra*, 5a.

a. The prosecution's star witnesses were Mr. Alston and Mr. Bennett. Their testimony was riddled with inconsistencies—with each other, with their own prior statements, and with the crime-scene evidence—about details that, were they true, should have been seared into their memories. For example, Mr. Alston testified that someone struck the back of Mrs. Fuller's head with a 2x4 piece of wood; Mrs. Fuller had no injuries to the back of her head (nor any injury consistent with being struck by a 2x4). Mr. Bennett testified that multiple individuals held down Mrs. Fuller's legs during the sexual assault. Yet Mrs. Fuller had no restraint marks on her body and there was no room in the corner of the garage where she was assaulted for people to have held her down. App., *infra*, 5a-6a; Pets. C.A. Br. 31-32 (citing evidence in record).

The prosecution also relied on Ms. Eleby and Ms. Porter. By the time of trial, Ms. Eleby testified that she had witnessed the murder, rather than merely heard Mr. Alston's purported confession. There is no dispute that she had "significant credibility problems." App., *infra*, 6a. As with Mr. Bennett and Mr. Alston, her testimony contradicted other witnesses' testimony, her own prior

statements, and the crime-scene evidence. Pets. C.A. Br. 33-34 (citing evidence in record). As to Ms. Porter, she claimed that Mr. Catlett had confessed to her, and was impeached with her grand jury testimony to the contrary. App., *infra*, 8a & n.4.

The prosecution relied on three other purported eyewitnesses. The government introduced the testimony of Linda Jacobs, a fourteen-year-old runaway, PCP user, and friend of Ms. Eleby, who claimed to have witnessed the crime. She too had "significant credibility problems." App., *infra*, 6a; Pets. C.A. Br. 24 (citing evidence in record). The government also introduced the testimony of Maurice Thomas, a fourteen-year-old boy who claimed to have witnessed the crime from nearly 150-feet away, and whose testimony the court of appeals acknowledges the jury "disbelieve[d]" at least in part. App., *infra*, 47a; Pets. C.A. Br. 35. Finally, the government introduced the testimony of Melvin Montgomery, a teenage drug dealer who claimed to have seen some of the defendants cross H Street to rob someone, but did not claim to have witnessed an assault. App., *infra*, 7a, 108a.

In short, as the lead prosecutor has stated, the case was "[n]ot a good one," and it "easily could have gone the other way." Pets. C.A. Br. 61 (citing testimony in record).

b. The prosecution's case, however, was undoubtedly bolstered by the trial dynamics of prosecuting a large group of individuals without a unified defense. As one famous criminal-defense attorney put it in commenting on this case during the trial, "[a] guy trying to extract his client has to point the finger at somebody else." Saundra Saperstein & Elsa Walsh, *10 Defendants Complicate Trial; Murder Case Attorneys Often Find Themselves At Cross-Purposes*, Wash. Post, Nov. 17, 1985, at A1 ("*10*

Defendants Complicate Trial"). Unable to develop an effective alternative-perpetrator defense due to the prosecution's suppression of evidence, counsel for each individual defendant merely asserted that, while other co-defendants may have attacked Mrs. Fuller, the defendant they represented was not among that group. In other words, the prosecutor could simply "sit back in his rocking chair and watch the defense squabble." *10 Defendants Complicate Trial, supra.*

c. The jury then deliberated for seven days. It eventually returned a mixed verdict, acquitting two defendants, Alphonzo Harris and Felicia Ruffin, and convicting five of the petitioners and Steven Webb, who has since died in prison. The jury stated it could not reach a verdict as to Christopher Turner and Mr. Overton. After two more days of deliberations, and numerous votes, the jury convicted Christopher Turner and Mr. Overton. App., *infra*, 10a-11a. The District of Columbia Court of Appeals affirmed petitioners' convictions. *Catlett* v. *United States*, 545 A.2d 1202 (D.C. 1988); *Turner* v. *United States*, Nos. 86-314 & 90-530, Mem. Op. & J. (D.C. Jan. 24, 1992).

B. Disclosure Of *Brady* Information

Petitioners have consistently maintained their innocence for more than three decades. After years of investigation, petitioners learned of some of the information withheld by the prosecution, and thus initiated a collateral challenge to their convictions. In the course of that litigation, petitioners learned of even more withheld information, including the information pointing to McMillan as the perpetrator of the crime. The most salient withheld information follows.

1. The prosecution failed to disclose information implicating two alternative perpetrators.

a. Three weeks after the murder of Mrs. Fuller, a woman named Ammie Davis gave a statement to the police regarding a man named James Blue. She stated that on the day of the murder, Blue had just been released from prison. She further stated that, on that day, she and a friend observed Blue grab a woman and "pull her into the alley," and that he beat the "f[***] out of her" and "killed [her] 'for just a few dollars.'" App., *infra*, 20a & n.14. Blue had previously been arrested for armed robbery, rape, and forcible sodomy. *Id.* 19a.

The prosecutor did not disclose any of the information relating to Blue to the defense. The prosecutor testified that he did not disclose the information because, after interviewing Ms. Davis, he decided that she was not credible. App., *infra*, 21a. Shortly before petitioners' trial, on October 9, 1985, Blue murdered Ms. Davis. Blue pleaded guilty to Ms. Davis' murder and died in prison in 1993. *Id.* 22a.

b. The prosecution also withheld information about James McMillan. Prior to trial, the prosecution had disclosed to defense counsel only that William Freeman, a street vendor who had discovered Mrs. Fuller's body, had observed two men in the alley, that he said one man had "something in his coat because it was puffed up," and that he said the two men fled when a police car arrived. Pets. C.A. Br. 12.

Yet, despite a specific request from defense counsel, the prosecution did not disclose the identities of the two men, one of whom was McMillan. Police considered McMillan a suspect, and he was interviewed by the lead prosecutor. See App., *infra*, 17a. The prosecution also did not disclose the fact that three other witnesses confirmed seeing McMillan in the alley. One of those witnesses, who was dating McMillan at the time, said that McMillan was "acting suspiciously" and had "something

under his coat." Pets. C.A. Br. 12-13; App., *infra*, 17a. Notably, the object used to sodomize Mrs. Fuller was never found. App., *infra*, 4a.

Shortly after Mrs. Fuller's murder, but before trial in this case, McMillan was arrested for robbing and assaulting two other middle-aged women in the neighborhood, another fact never disclosed to the defense. App., *infra*, 17a-18a. McMillan served approximately eight years in jail for those crimes. About two months following his release, in 1992, McMillan forcibly sodomized and beat to death another woman, who was found in an alley only three blocks from the alley where Mrs. Fuller was found. McMillan's victim and Mrs. Fuller both died from blunt force trauma to the head and torso. App., *infra*, 19a. They were both sexually assaulted in the same rare manner that accounts for "considerably less than one percent of homicide cases," and someone who commits such an act once is likely to do so again. *Ibid.* McMillan was sentenced to life without parole and remains incarcerated. *Ibid.*; see Pets. C.A. Br. 28.

2. The prosecution additionally withheld information contradicting its theory that a large group of individuals committed the crime. Specifically, the prosecution did not disclose that four witnesses, including Willie Luchie, Jackie Watts, and Ronald Murphy, walked through the alley between 5:30 and 5:45 p.m., close to the estimated time of death. These witnesses did not see a group attack, or any group at all. Instead, two of the witnesses heard groans coming from the garage, which "undoubtedly" were made by Mrs. Fuller. App., *infra*, 16a, 50a.

In addition, one witness, Mr. Luchie, reported that the garage doors were closed at the time. That fact is significant because Mr. Freeman testified that one of the doors was open when he found Mrs. Fuller, about 15 to

30 minutes after these four witnesses walked through the alley. App., *infra*, 16a.

The natural inference from these witnesses' testimony is that Mrs. Fuller was being assaulted in the garage while the four witnesses walked through the alley, and that whoever committed the crime then left the garage before Mr. Freeman arrived. As the trial prosecutor conceded, if the assault was taking place at that time, it could not have involved "more than one or a very few assailants." App., *infra*, 16a.

3. The prosecution also withheld evidence impeaching the witnesses on whom its case relied.

As to Ms. Eleby, who was already impeached on numerous grounds, including her repeated denials that she had ever witnessed the crime, App., *infra*, 22a n.18, the prosecution withheld evidence that Ms. Eleby was high on PCP while viewing police photos and identifying suspects, and that she had suborned her friend, Ms. Porter's false statement to police that Ms. Porter had heard Mr. Catlett's alleged confession. *Id.* at 22a-23a.

As to Ms. Porter, the prosecution withheld her initial statement to the police claiming that Mr. Alston had confessed to her, which was in tension with her testimony at trial that Mr. Catlett had confessed to her. And, as alluded to above, the prosecution withheld her admission that she had lied to the police about Mr. Alston's purported confession at Ms. Eleby's behest. App., *infra*, 22a.

As to Ms. Jacobs, the prosecution withheld the fact that she also repeatedly denied witnessing the crime, vacillating on whether she had witnessed it up to the time of trial. Pets. C.A. Br. 66. The prosecution additionally withheld information that called into question the harshness of the detectives' interrogations, such as one detective touching her "like a father would touch a

daughter," and then immediately pounding the table when Ms. Jacobs did not tell him what he considered to be the truth. *Id.* at 24 (citing evidence in record).

As to Mr. Thomas, he testified at trial that his Aunt Barbara could corroborate his claim that he observed the attack from nearly 150 feet away. The prosecution withheld information that the police had in fact interviewed his aunt and that she did not corroborate his account. App., *infra*, 23a.

C. Petitioners' Application For Postconviction Relief

1. In 2010, petitioners filed motions to vacate their convictions or alternatively to receive new trials based on exculpatory evidence withheld from them at trial. As a result of discovery in the postconviction proceedings, petitioners filed amended motions raising additional exculpatory, withheld evidence.

The Superior Court held an evidentiary hearing on the application. In addition to the withheld evidence, petitioners presented testimony from two expert witnesses that, based on the objective crime-scene evidence, Mrs. Fuller was more likely attacked by one or two assailants rather than a large group, and that the attack occurred in the corner of the garage where Mrs. Fuller's body was found. App., *infra*, 23a-24a. The government did not dispute this testimony. In addition, Mr. Alston, Mr. Bennett, Ms. Jacobs, and Mr. Montgomery each took the stand and recanted their trial testimony. *Id.* at 12a-16a. Mr. Yarborough also took the stand to recant the contents of his videotaped statement. *Id.* at 65a-67a.

2. The Superior Court denied petitioners' motion. App., *infra*, 81a-131a. It did not find the recantations credible. *Id.* at 110a. It further held that the alternative-perpetrator evidence was not material because a jury would either not have credited it or assumed that the

alternative perpetrators could have simply been additional participants in the group attack. *Id.* at 123a. The court did not address the materiality of the evidence regarding the four witnesses in the alley. Finally, regarding the impeachment evidence, the court reasoned that it was not material because the prosecution's witnesses had already been heavily impeached on other grounds. App., *infra*, 124a-125a & nn.23-24.

3. The District of Columbia Court of Appeals affirmed. App., *infra*, 1a-78a.

To start with, in conducting its *Brady* materiality analysis, the court categorically refused to consider the fact that McMillan had committed an eerily similar murder and forcible sodomy in 1992. The court reasoned that, because that crime occurred after petitioners' trial, it had "no bearing on the question of the materiality of any evidence that the government actually did withhold from the defense." App., *infra*, 36a. As to the remaining evidence regarding McMillan, the court emphasized that McMillan had not murdered his other assault and robbery victims, and noted that the jury may have believed he was just another participant in the crime. *Id.* at 36a, 50a-51a.

Regarding the withheld statement of Ms. Davis implicating Blue, the court reasoned that her testimony could not have been presented at petitioners' trial because Blue murdered her shortly before trial. Thus, Ms. Davis' suppressed statement could have been introduced at trial "only to the very limited extent it would have had value in demonstrating a slip-up in the government's investigation." App., *infra*, 45a.

As to the withheld evidence relating to the four witnesses in the alley, the court admitted that their testimony would have contradicted the government's theory that a large group committed the crime. The court rea-

soned, however, that the jury might not have credited their testimony because, for example, the jury might have determined that they were mistaken. App., *infra*, 50a.

Finally, as to the withheld impeachment evidence, the court reasoned that it "had little prospect of changing the result at trial" primarily because the witnesses had already been thoroughly impeached. App., *infra*, 45a.

4. Petitioners moved for division and en banc rehearing. The District of Columbia Court of Appeals denied the motion. App., *infra*, 79a-80a.

All of the petitioners except Christopher Turner remain in prison, still serving sentences imposed more than 30 years ago. Two of the petitioners—Clifton Yarborough and Kelvin Smith—recently were denied parole, principally because they maintain their innocence.

REASONS FOR GRANTING THE PETITION

This case presents the Court with the opportunity to provide guidance to lower courts and prosecutors concerning the proper application of *Brady* v. *Maryland*, 373 U.S. 83 (1963)—and, in so doing, to correct an egregious *Brady* violation that no doubt undermines confidence in the conviction of eight young men for a brutal rape and murder. Pursuant to *Brady*, a defendant challenging his conviction must demonstrate that the prosecution withheld evidence favorable to the defendant, and that the withheld evidence was material. *E.g.*, *Wearry* v. *Cain*, 136 S. Ct. 1002, 1006 (2016) (per curiam). Most of the Court's cases concerning *Brady* have concerned the second half of this standard, the materiality analysis. See, *e.g.*, *id.* at 1006-1007; *Smith* v. *Cain*, 132 S. Ct. 627, 630-631 (2012); *Wood* v. *Bartholomew*, 516 U.S. 1, 8-10 (1995) (per curiam); *Kyles* v. *Whitley*, 514 U.S. 419, 434-

441 (1995); *United States* v. *Bagley*, 473 U.S. 667, 674-684 (1985). This case does as well. Reflecting the standard's "overriding concern with the justice of the finding of guilt," the materiality standard is not demanding. *United States* v. *Agurs*, 427 U.S. 97, 112 (1976). Withheld evidence will be material if "there is any reasonable likelihood it could have affected the judgment of the jury." *Wearry*, 136 S. Ct. at 1006 (citations omitted).

The withheld evidence in this case amply satisfies that standard. In the decision under review, however, the District of Columbia Court of Appeals categorically refused to consider, as part of its materiality analysis, events arising after trial, in light of its holding that such events may not be relied upon to demonstrate the materiality of withheld evidence. This holding deepens a conflict among the federal courts of appeals and state courts of last resort on this issue.

Moreover, with or without consideration of post-trial events, the District of Columbia Court of Appeals' decision cannot be reconciled with *Kyles*, 514 U.S. 419, and other decisions of this Court on the materiality standard for *Brady* claims. The petition for a writ of certiorari should be granted.

A. The Decision Below Deepens A Conflict Among The Federal Courts Of Appeals And State Courts Of Last Resort

In analyzing the materiality of the prosecution's withholding of evidence that James McMillan was acting suspiciously at the crime scene and fled when the police arrived, the District of Columbia Court of Appeals refused to consider the evidence of McMillan's subsequent, strikingly similar murder. The court's decision deepens a conflict among federal courts of appeals and state courts of last resort concerning whether post-trial in-

formation can shed light on the materiality of suppressed evidence. That conflict warrants this Court's review.

1. The Second Circuit and Supreme Court of Missouri have held that courts may consider post-trial events in conducting a *Brady* materiality analysis. In *Leka* v. *Portuondo*, 257 F.3d 89 (2d Cir. 2001), the Second Circuit considered the *Brady* claim of a man convicted of second degree murder and criminal possession of a weapon. His conviction rested largely on two witnesses who identified him as the shooter. The prosecutors withheld that a third witness identified a different man as the shooter. After trial, both of the prosecution's witnesses recanted their identifications. In concluding that the prosecution had suppressed material evidence in violation of *Brady*, the Second Circuit specifically stated that its "evaluation of materiality considers * * * the recantations made by those eyewitnesses[.]" *Id.* at 97.

Similarly, the Supreme Court of Missouri has held that "substantial post-trial developments" can "raise serious doubts regarding" a conviction and render it "no longer 'worthy of confidence.' " *State ex rel. Griffin* v. *Denney*, 347 S.W.3d 73, 78-79 (Mo. 2011) (citation omitted). In *Griffin*, the defendant was a prison inmate accused of fatally stabbing another inmate with a sharpened screwdriver. Two witnesses stated that they saw the defendant commit the murder. The government never disclosed to the defense, however, that at the time of the murder the prison guards confiscated a sharpened screwdriver from a different inmate. In conducting its *Brady* materiality analysis, the court noted that one witness had recanted his trial testimony and that other witnesses had since come forward with exculpating information. *Id.* at 78-79. In holding that the withheld evidence—the confiscation of the screwdriver from another inmate—was material, the court noted that it "considers

all available evidence uncovered following the trial" in evaluating materiality. *Id.* at 77. Thus, although the developments subsequent to trial concerning the prosecution's witnesses were not themselves suppressed evidence, they were relevant to the analysis because they nevertheless indicated the materiality of the suppressed evidence.

The Supreme Court of Missouri adhered to this rule in *State ex rel. Woodworth* v. *Denney*, 396 S.W.3d 330 (Mo. 2013), where it considered various statements made by witnesses only after trial in determining the materiality of withheld evidence. *Id.* at 345-346. The court explained that, in evaluating the materiality of suppressed evidence, courts "should consider the effect of all of the suppressed evidence along with the totality of the other evidence uncovered following the prior trial." *Id.* at 345.

2. By contrast, the Sixth Circuit and the Supreme Court of Delaware have held that evidence arising after trial is not relevant to the materiality analysis of withheld evidence. In *Apanovitch* v. *Bobby*, 648 F.3d 434 (6th Cir. 2011), the government sought to introduce post-trial evidence of guilt to defeat a *Brady* claim, claiming that new DNA evidence established the defendant's guilt and showed that the suppressed evidence was not material. The Sixth Circuit refused to consider the DNA evidence, flatly holding that it was "not relevant" in the *Brady* context. *Id.* at 438.

The Supreme Court of Delaware reached a similar conclusion in *Wright* v. *State*, 91 A.3d 972 (Del. 2014). In that case, the court considered a *Brady* claim concerning suppressed evidence that a witness had previously signed a cooperation agreement with the government. *Id.* at 990. That witness later also recanted his testimony, but the court held that post-trial recantations are

"not part of th[e] *Brady* analysis" because they did not exist at the time of trial. *Id.* at 990 n.61.

3. The District of Columbia Court of Appeals erred in adopting a categorical rule that post-trial events and evidence have "no bearing on the question of the materiality of any evidence that the government actually did withhold." App., *infra*, 36a. The nature of *Brady* claims frequently requires consideration of post-trial information and evidence. Indeed, this Court has specifically recognized that post-trial evidence may "confirm[]" the materiality of withheld evidence. *Kyles*, 514 U.S. at 448.

When defendants discover suppressed evidence after trial, they regularly try to demonstrate the materiality of the evidence by developing it as they would have had the evidence been timely disclosed. In this case, for example, McMillan's 1992 murder is probative of the fact that, had the prosecution not suppressed information about McMillan, defense counsel could have investigated McMillan and uncovered and introduced evidence relating to his propensity toward sexual violence and sodomy. Similarly, given that the injuries to McMillan's 1992 victim were more extensive than those to Mrs. Fuller, see App., *infra*, 112a n.14, that crime serves as evidence that defense counsel could have proven that McMillan had the ability to commit such a vicious assault without the participation of a large group. Because such evidence might have been discovered but for the prosecution's suppression, that showing "undermines confidence in the outcome of the trial." *Kyles*, 514 U.S. at 434 (citation omitted).

The courts that have categorically refused to consider post-trial information reason that *Brady* materiality review turns on "whether a past trial might have had a different outcome had available evidence not been kept from the defendant"—and "*not* on whether new, previ-

ously unobtainable evidence not kept from the defendant might lead to a different result in a new trial." App., *infra*, 36a-37a (emphasis added). That analysis elides a critical possibility: that "previously unobtainable evidence" *might indicate* "whether a past trial might have had a different outcome." Indeed, this Court's decisions demonstrate the breadth of the information that courts should consider when making materiality determinations. See, *e.g.*, *Kyles*, 514 U.S. at 447-448 (admissions by prosecutor and detective elicited post-trial "confirmed" materiality); *Wood*, 516 U.S. at 8 (results of cross-examination using withheld evidence "the best possible proof" of lack of materiality).

Ultimately, the "overriding concern" when construing the "proper standard of materiality" is "the justice of the finding of guilt." *Agurs*, 427 U.S. at 112. It is hard to conceive of evidence more probative to the justice of the finding of guilt of petitioners than McMillan's sickeningly similar murder, committed just months after he was released from prison for assaults and robberies that themselves resemble what happened to Mrs. Fuller. Categorically excluding post-trial evidence when it is so obviously probative of the materiality of withheld evidence neuters the *Brady* inquiry.

B. The Decision Below Is Inconsistent With This Court's Decisions

In recent years this Court has repeatedly criticized the lower courts for misapplying its *Brady* jurisprudence, often because those courts erroneously discounted the materiality of suppressed evidence and left questionable convictions intact. The opinion below is a textbook example of practically every error this Court has condemned and reflects the continued confusion of

courts in determining *Brady* materiality. For these reasons it warrants this Court's review and correction.

1. Withheld evidence will satisfy the *Brady* materiality standard if "there is any reasonable likelihood it could have affected the judgment of the jury." *Wearry*, 136 S. Ct. at 1006 (citations omitted). A petitioner therefore need only demonstrate the "*possibility* of an acquittal" had the suppressed evidence been disclosed, not that an acquittal was certain, or even that it was likely. *Kyles*, 514 U.S. at 435 (emphasis added). The Court's materiality decisions have identified three principles that underlie this general materiality standard.

First, the Court has directed that lower courts must resist basing their materiality determinations around what a "jury *could* have disbelieved," without being able to show that the jury "*would* have done so." *Smith*, 132 S. Ct. at 630. Such niggling "merely leaves us to speculate about" what the jury would do, *ibid.*, and fails "to preserve the criminal trial * * * as the chosen forum for ascertaining the truth about criminal accusations." *Kyles*, 514 U.S. at 440; see also *id.* at 450-451. Indeed, in *Wearry*, the Court recently again had cause to vacate a conviction after the lower court "emphasized reasons a juror might disregard new evidence while ignoring reasons she might not." 136 S. Ct. at 1006-1007.

Second, in determining materiality, this Court has reversed decisions that, while claiming to conduct a cumulative analysis, actually "improperly evaluated the materiality of each piece of evidence in isolation." *Id.* at 1007. Not only must rigorous, cumulative consideration be the "touchstone" of the analysis, but materiality also considers the impact of the withheld evidence in "the context of the existing or potential evidentiary record." *Kyles*, 514 U.S. at 439-440.

And, third, the *Brady* materiality inquiry does not concern whether the prosecution's evidence was sufficient or even whether, "by a preponderance," the withheld evidence "would have resulted ultimately in the defendant's acquittal." *Kyles*, 514 U.S. at 434. Rather, the materiality inquiry concerns whether the withheld evidence "could reasonably be taken to put the whole case in * * * a different light." *Id.* at 435.

2. Despite at times intoning the proper standards, the District of Columbia Court of Appeals failed to apply any of these three interrelated principles.

a. As an initial matter, the District of Columbia Court of Appeals' decision is rife with speculation emphasizing "reasons a juror might disregard" the suppressed evidence in this case. *Wearry*, 136 S. Ct. at 1007. Such speculation in fact makes up much of the court's materiality analysis. Confronted with the fact that Mr. Luchie and Ms. Watts did not see a group attack despite hearing moans coming from the garage, the court hypothesizes a jury "more likely" would have concluded that the assault had already ended or that it is "far more likely" that the jury would have simply thought Mr. Luchie was mistaken. App., *infra*, 50a.

The court of appeals' speculation reaches its peak when, in reasoning perhaps borrowed from the *deus ex machina* of Greek tragedies,[2] it conjures a convoluted scenario where McMillan does not participate in the crime but eliminates the exculpatory nature of the withheld evidence: The court concludes that a jury could have thought that McMillan first came into the alley sometime after Mr. Luchie and Mr. Watts left but before Mr. Freeman discovered the body. App., *infra*, 50a-51a.

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[2] See, *e.g.*, Euripides, *Medea*.

The court hypothesizes that McMillan himself might have then opened the door to the garage, then left the scene sometime before Mr. Freeman arrived, only to then return when Mr. Freeman and others were waiting for police to arrive. The court then creates a potential reason why McMillan would have done these things, reasoning that it is "not implausible that McMillan heard about the attack and decided to look in [the garage] out of curiosity." *Id.* at 51a n.81. The court then "explain[s] his suspicious behavior" by inferring that McMillan may have then "carried away something from the garage." *Ibid.* This mountain of speculation, the court of appeals concludes, "provid[es] an explanation for Luchie's and Freeman's observations of the garage door that did not rely on the supposition that the assailants were still present." *Id.* at 51a.

That is the type of wild hypothesizing a prosecutor might have to engage in to try to explain away exculpatory evidence; it is not a basis for denying petitioners a fair trial. A jury might well have believed, or at least found reasonable doubt based on, the simplest explanation of these facts: that the murder was not committed by petitioners but instead by McMillan, who was committing the murder in the garage when Mr. Luchie and Ms. Watts walked through the alley. Denying petitioners relief based on speculation—especially tortured speculation of the type above—about how a jury would have viewed withheld evidence deprives "the criminal trial" of its place "as the chosen forum for ascertaining the truth about criminal accusations." *Kyles*, 514 U.S. at 440.

b. The District of Columbia Court of Appeals also failed to meaningfully engage in a cumulative analysis of the withheld evidence in the context of the existing evidentiary record. *E.g.*, *Kyles*, 514 U.S. at 439. The

court's conclusion regarding materiality was grounded in its premise that the jury found the prosecution's witnesses credible, presumably because it returned guilty verdicts. App., *infra*, 50a. Notably the court reached this conclusion after cataloging how prosecution witnesses were roundly impeached at trial, including that part of one witness's testimony was "unbelievable on its face." *Id.* at 45a-47a.

In any event, the court's assumption that the jury believed the prosecution's witnesses cannot be reconciled with the jury's verdict—especially in the context of petitioners' trial—or even the words of the prosecutor. The prosecutor admitted that the case was a weak one that "easily could have gone the other way," even without the withheld evidence. See p. 8, *supra*. After the evidence was in, the jury took a week to return any verdicts. App., *infra*, 10a. And, when it did return a verdict, it acquitted two of the defendants, and admitted that it was deadlocked as to two others, Christopher Turner and Mr. Overton. See *Agurs*, 427 U.S. at 112 (noting that the materiality standard is lower in close cases). That verdict itself shows that the jury did not believe all of the prosecution's witnesses, especially given that prosecution witnesses implicated the acquitted defendants in the crime. *E.g.*, App., *infra*, 47a.

The inference that the jury necessarily credited the prosecution's version of events is particularly inappropriate given the type of trial petitioners had. The prosecution's withholding of evidence denied petitioners and their co-defendants the opportunity to present a unified defense that challenged the prosecution's theory of the crime. They instead presented a "not me, maybe them" defense and did not directly challenge the overall credibility of the prosecution's group-attack theory. See pp. 8-9, *supra*. Essentially, the jury was confronted with the

question of *which* defendants had committed the group attack, not whether the group attack occurred at all. Accordingly, as a result of the prosecution's suppression, the jurors never heard many of the reasons to doubt the prosecution's witnesses.

The court of appeals further failed to accord weight to the most important evidence in the case—the objective, crime-scene evidence. The location of the victim's body itself contradicts the group-attack theory, as the victim was found in a corner, just feet away from two sides of a small garage and near an upright shoeshine box. Pets. C.A. Br. 10, 14-15 (citing evidence in record). There was no blood found in other parts of the garage. It is common sense that the frenzied group attack presented by the prosecution—in which people held down the victim while another assaulted her with an object—could not have happened in that confined space. See App., *infra*, 16a, 32a. This crime-scene evidence was matched with scientific testimony explaining that the pattern of Mrs. Fuller's injuries indicated that she was not assaulted by a large group. *Id.* at 24a. This evidence, when coupled with the withheld evidence, would suggest that the government's theory of the crime was fundamentally mistaken and provide jurors with a reason why the accounts of the prosecution's teenage witnesses were so jumbled and riddled with inconsistencies. This objective evidence would also have been the foundation for explaining to the jury that McMillan committed the crime.

c. The District of Columbia Court of Appeals nevertheless held that the withheld evidence was not material chiefly because it attacked the "basic structure of how the crime occurred," and thus required a "reasonable probability" that the jury would have "doubt[ed] *virtually everything*" offered by the prosecution witnesses.

App., *infra*, 54a. This Court's materiality standard asks, however, whether the withheld evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435.

Evidence of a credible alternative perpetrator, especially when there is no physical evidence tying the defendant to the crime, will practically always "put the whole case in * * * a different light" because it will fundamentally change the trial. A credible alternative perpetrator provides the defense and the jury with a different account of the crime. Petitioners are not aware of any other reported decision in which withheld evidence of a plausible alternative perpetrator has not been held to be material. Indeed, language in decisions from the Sixth and Ninth Circuits would suggest that alternative-perpetrator evidence is per se material. See, *e.g.*, *Bies* v. *Sheldon*, 775 F.3d 386, 400 (6th Cir. 2014) (holding that the State "must disclose the existence of legitimate suspects" (alteration in original omitted; citation omitted)); *Williams* v. *Ryan*, 623 F.3d 1258, 1266 (9th Cir. 2010) ("[T]he government may not, consistent with *Brady*, suppress information that another person committed the crime for which the defendant is on trial.").

As this caselaw suggests, the court of appeals' conclusion that withheld evidence must call into question the testimony of all prosecution witnesses cannot be reconciled with this Court's holdings regarding *Brady* materiality. The Court frequently has held that withheld evidence satisfied the materiality standard despite the evidence not undermining all, or even most, of the prosecution's evidence.

In *Kyles*, for example, this Court held that withheld evidence was material when it undermined some of the prosecution's eyewitnesses and bolstered the defendant's

theory that he was framed. The Court reached that conclusion even though two of the four eyewitnesses were "totally untouched" (and a third "barely affected") by the withheld evidence. 514 U.S. at 435 n.8, 443 n.14. The Court even reached that conclusion despite the fact that the holster and ammunition for the murder weapon were located in Mr. Kyles's residence. *Id.* at 451.

In *Smith*, the Court considered the case of a man convicted of a group murder on the strength of an eyewitness identification. After trial, defense counsel found police notes suggesting that on the day of the murder the key eyewitness told the officer that he could not identify the perpetrators. 132 S. Ct. at 629-630. However, notes from other police officers and investigators indicated that what the eyewitness had actually said, and remembered saying, was that he could not identify any of the perpetrators *except for one*—the lead perpetrator who had not been wearing a mask. Moreover, despite looking at 14 photo arrays over many months, the eyewitness never made an identification until the day he was shown a picture of the defendant, at which point he said, "This is it. I'll never forget that face." *Id.* at 632 (Thomas, J., dissenting). Despite that strong evidence supporting guilt, the Court found the withheld evidence material.

In *Wearry*, a case involving a vehicular murder, the Court considered the materiality of withheld evidence that a witness testified because he had a grudge against the defendant, that another witness had sought a deal to shorten his sentence in exchange for testimony, and that one aspect of the first witness's account was possibly contradicted by disputed medical evidence. 136 S. Ct. at 1004-1005. The prosecution could nevertheless still point to three untainted witnesses who testified that they saw the defendant driving the victim's car; one witness who testified that blood was on the car that night; other un-

tainted witnesses who testified that the defendant had sought to sell them personal items that had belonged to the victim; and three jailers who testified that they heard the defendant make self-inculpating statements. *Id.* at 1010-1011 (Alito, J., dissenting).

In none of these cases did this Court require that the withheld evidence cast doubt on all the prosecution witnesses. And rightly so—any such standard would effectively immunize a prosecution from challenge under *Brady* so long as the prosecution could support its theory of the crime through testimony of multiple witnesses. If there were ever a formula for encouraging prosecutors to "tack[ ] too close to the wind" and not disclose favorable information to the defense, *Kyles*, 514 U.S. at 439, the court of appeals' holding would qualify. Already "[t]here is an epidemic of *Brady* violations abroad in the land. Only judges can put a stop to it." *United States* v. *Olsen*, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, C.J., dissenting from denial of en banc rehearing). Indeed, the Court may wish to consider summary reversal to remind the lower federal courts and the state courts of the importance of *Brady*'s constitutional guarantee.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider the possibility of summary reversal; in the alternative, the Court should grant plenary review and set the case for briefing and oral argument.

Respectfully submitted.

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 12-CO-1362, 12-CO-1538, 12-CO-1539, 12-CO-1540, 12-CO-1541, 12-CO-1542, & 12-CO-1543

CHARLES S. TURNER, CHRISTOPHER D. TURNER, RUSSELL L. OVERTON, LEVY ROUSE, CLIFTON E. YARBOROUGH, KELVIN D. SMITH, & TIMOTHY CATLETT, Appellants

v.

UNITED STATES, Appellee.

Argued April 29, 2014
Decided June 11, 2015

Before GLICKMAN and BLACKBURNE–RIGSBY, Associate Judges, and NEBEKER, Senior Judge.

Opinion

GLICKMAN, Associate Judge.

In 1985, appellants were tried and convicted for the kidnapping, armed robbery, and first-degree felony murder while armed of Catherine Fuller on October 1, 1984. This court affirmed their convictions on direct appeal.

Some twenty-five years later, appellants returned to Superior Court with motions to vacate their convictions pursuant to D.C. Code § 23–110 (2012 Repl.) and the Innocence Protection Act ("IPA"), D.C. Code § 22–4135 (2012 Repl.). Appellants claimed that they did not receive a fair trial because the government withheld exculpatory and impeachment evidence in violation of its obligations under *Brady v. Maryland*,[1] and that newly discovered evidence, including witness recantations, established their actual innocence of the crimes against Mrs. Fuller. Appellant Yarborough additionally claimed that his trial counsel was constitutionally ineffective in failing to investigate his intellectual disabilities as grounds for suppressing the videotaped statement he made when he was arrested, which the government used against him at trial.

Appellants' motions were assigned to the Honorable Frederick H. Weisberg. He presided over a three-week evidentiary hearing on their claims in mid–2012. Judge Weisberg thereafter denied the motions in a written order. Before us now are the appeals from that decision.

We affirm. As we shall explain, we conclude that appellants' *Brady* claims fail because appellants have not shown a reasonable probability that the outcome of their trial would have been different had the government disclosed the withheld evidence in timely fashion. Appellants' IPA claims fail because the motions judge found the witness recantations to be incredible and appellants therefore have not established their actual innocence by a preponderance of the evidence. Finally, we reject Yarborough's ineffective assistance claim because he has not

[1] 373 U.S. 83 (1963)

shown that he was prejudiced by his trial counsel's allegedly deficient performance.

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I. The Murder of Catherine Fuller and Appellants' 1985 Trial

Shortly after 4:30 p.m. on October 1, 1984, Catherine Fuller left her home on foot to go shopping. Around 6:00 p.m., William Freeman, a street vendor, discovered her lifeless body lying in a garage in the middle of an alley between 8th and 9th Streets Northeast, just north of H Street. One of the garage doors was open, enabling Freeman to catch sight of Fuller's body when he entered the alley to relieve himself. Mrs. Fuller had been badly beaten and violently sodomized, and had suffered massive blunt force injuries, including a ruptured liver and broken ribs. Her clothing and property were found strewn about the garage and the alley. The police were unable to find the object used to commit the sodomy or to recover any usable fingerprints or other physical evidence that could identify the perpetrators. The medical examiner could not determine from Fuller's injuries how many persons were involved in assaulting her.

After conducting more than 400 interviews, investigators developed the theory that Fuller was assaulted and killed by a large group of teenagers who initially set out,

on the spur of the moment, to rob her. A total of thirteen individuals believed to have been members of that group were indicted. Two of them, Harry Bennett and Calvin Alston, pleaded guilty and agreed to testify for the government. A third defendant, James Campbell, whose case was severed for trial after his attorney became ill, eventually pleaded guilty as well. The remaining defendants—the seven appellants before us now and their co-defendants Steven Webb, Alphonzo Harris, and Felicia Ruffin—went to trial in the fall of 1985.

A. The Government's Case at Trial

At the center of the government's case was the testimony of the two cooperating witnesses, Bennett and Alston. Bennett had pleaded guilty to manslaughter and robbery, Alston to second-degree murder. They provided similar accounts of the events leading to Fuller's death. According to them both, they were in a group of young men, including appellants, who were gathered in a park at 8th and H Streets Northeast on the afternoon of October 1, 1984, when they observed Fuller across the street. Alston admitted being the one who, after appellant Catlett sang a song about needing money, suggested that the group rob Fuller. Members of the group split into two bodies and crossed the street to attack Fuller at the alley between 8th and 9th Streets. Bennett, Alston, and others, including appellants, punched and kicked her, hit her with a stick or board, knocked her to the ground, and robbed her of her money and jewelry. Fuller then was dragged into a garage and stripped nearly naked. As some in the group held her legs and others stood and watched, appellant Rouse took a pole or pipe-like object and shoved it into her rectum. The group then dispersed.

Although Bennett and Alston agreed on the preceding outline of events, they differed on some important matters. Notably, while Bennett testified that appellant Yarborough did not accompany the group into the alley, Alston recalled that Yarborough actively participated in kicking Fuller as she lay on the ground there. And while Bennett remembered that Alston and Webb held Fuller's legs as Rouse sodomized her, Alston thought appellants Overton and Charles Turner did so. In addition, Bennett and Alston each had made prior inconsistent statements to the police and the grand jury regarding who was present in the park and who participated in attacking Fuller.

Four witnesses to the crime corroborated Bennett and Alston's account. Two of them, Carrie Eleby and Linda Jacobs, testified that they came upon the attack when it was already in progress. Eleby implicated appellants Catlett, Overton, Christopher Turner, Smith, and Rouse, as well as Alston and Webb. She also put appellant Yarborough in the alley, but she did not remember seeing him attack Fuller. Jacobs saw Christopher Turner and Smith in the alley. Both witnesses saw Rouse sodomize Fuller.

Eleby and Jacobs had significant credibility problems. Both were PCP users. Eleby contradicted herself, could not keep names and dates straight, and claimed she did not remember anything she had told the police or the grand jury. Jacobs, too, was a difficult witness who contradicted herself on the stand and had trouble answering questions. Moreover, each witness's account was impeached or contradicted by other testimony. For example, contrary to her testimony at trial, Eleby told police that she and Jacobs arrived at the alley only after the police and the morgue staff were there, and she told the grand

jury that appellant Smith did not hit or kick Fuller. In addition, Eleby testified that she and Jacobs were with their friend Tawana when they heard a scream coming from the alley, turned around and saw a group attacking a woman. But Jacobs testified they were not with Tawana and did not hear a scream. She claimed they were prompted to enter the alley by their friend Annette Taylor. But Taylor denied this and testified that she was nowhere near the scene at the time.

The other two eyewitnesses were Melvin Montgomery and Maurice Thomas. Montgomery testified that he saw appellants Catlett, Charles Turner, Overton, and Rouse standing with others in the park. Montgomery heard Catlett singing a Chuck Brown song about needing money, saw Overton point across the street at Fuller, and watched as those four appellants and others crossed the street in her direction.[2]

Fourteen-year-old Maurice Thomas testified that he passed the alley and saw a group of people surrounding a woman. Those he saw included appellants Catlett, Yarborough, Rouse, Charles Turner, and Christopher Turner, and may have included appellant Smith and Harry Bennett.[3] Thomas saw Catlett pat down the woman and then place something in his pocket. Catlett then hit her and when she fell to the ground, the rest of the group assaulted her. Later that evening, Thomas heard Catlett tell someone that "we had to kill her because she spotted someone" Catlett was with.

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[2] Montgomery, who knew each of the appellants, also saw Yarborough in the park, but not until after the assault on Fuller was over.

[3] Thomas did not see Overton in the alley.

The government put on other important evidence of appellants' guilt in its case-in-chief. First, the jury was shown a redacted videotape of Yarborough's statement to the police, in which he placed himself in the park, the alley, and the garage before and during the attack on Fuller. (The statement was admitted only against Yarborough.)

Second, Kaye Porter testified that she had asked Catlett about the rumors she had heard concerning the Fuller murder. Catlett responded that "all he did was kick her and somebody else stuck the pole up in her" because "she wasn't acting right."[4] Finally, Detective Daniel Villars testified that he overheard Christopher Turner tell Overton that the police lacked sufficient evidence against them because they had not touched Fuller's body and so did not leave any fingerprints. Overton agreed that the police lacked evidence and commented that he knew the two people who gave them up. Turner replied that he knew one of the two, but that he wondered how the police knew he, Overton, and "everybody" were in the alley.

B. The Defendants' Alibis and the Government's Rebuttal

Appellants Overton, Smith, Christopher Turner, Charles Turner, and Rouse put on alibi defenses.[5] Overton's alibi was supported by three witnesses. Marita Michaels testified that she was in the park at 8th and H

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[4] Porter was impeached with her grand jury testimony in which she said Catlett denied any involvement in the crime.

[5] Appellant Yarborough's attorney proffered in his opening statement that the evidence would show Yarborough was at his girlfriend's house at the time of Fuller's murder, but no such evidence was presented. (Yarborough's girlfriend, Chandera Hill, did testify, but only to the fact that Maurice Thomas disliked Yarborough.)

Streets with Overton and others from about 10:00 a.m. to about 2:30 p.m. on October 1, drinking and smoking marijuana. Michaels said that she and Overton left the park together and that she saw him walking towards his house, appearing very drunk. Overton's grandmother Edna Adams, and his sister Lottie Overton, testified that he left the house that morning, and returned home drunk between 2:00 and 3:00 p.m. Adams said he remained home and slept until 7:30 p.m.; Overton's sister confirmed that he remained at home on October 1 until at least 5:00 p.m., when she left the house herself. Overton's family members admitted, however, that his grandmother's memory was weak and that his sister and mother had reminded her of many of the details in her testimony. Adams was impeached on various details with her grand jury testimony. Lottie Overton was impeached with her grand jury testimony that Overton had asked her to ask people he knew in the park to be witnesses for him, which was contrary to her trial testimony that he did not do so. Even after being presented with the transcript, she denied having said this to the grand jury. But Adams testified that Overton did tell Lottie and his mother to go ask certain people to be witnesses. Overton himself did not testify at trial.

Smith and Christopher Turner testified that they were at Smith's house on October 1. They said they first learned of Fuller's death later that night in a phone call from a girl named Renee Walker. Three of Smith's relatives corroborated his and Christopher Turner's alibis. Before the grand jury, however, they testified that Smith knew about Fuller's murder as early as 6:00 p.m. on October 1.

Rouse and Charles Turner had conflicting alibis. Rouse testified that he spent the afternoon of October 1 at a recreation center, restaurants and arcades with Charles Turner and a friend named Christopher Taylor, that he went to the alley at 8th and H Streets only after the police were already there, and that he then went at around 7:00 p.m. to the home of his girlfriend Catrina Ward. But Charles Turner testified he was at home at the time of Fuller's murder and left there only when Rouse and a friend named Vincent Gardner came by and told him someone had been killed in the alley behind H Street.

Christopher Taylor corroborated Rouse, but he was impeached with his admissions to police that he was in the park and heard the group decide to assault Fuller, and that he was in the alley and saw the murder. Catrina Ward confirmed that Rouse came to her house on the night of October 1. She also testified, however, that she saw blood splattered on the bottom of Rouse's pants leg, and that on later occasions Rouse told her he saw Fuller get killed and boasted that he "did the worst thing to that lady in the alley." Charles Turner was impeached with his statement to the police that Rouse and Gardner did not tell him about the crime. And Gardner, testifying as a rebuttal witness, denied going to Charles Turner's house or going anywhere with Rouse on the night of October 1.

C. Verdicts and Direct Appeal

The case was submitted to the jury on December 9, 1985. On the morning of December 16, the jury asked to see the videotape of Yarborough's incriminating statement to the police. That afternoon, after seven days of deliberations, the jury returned guilty verdicts against Catlett, Rouse, Smith, Charles Turner, Yarborough, and

Webb; at the same time, the jury found their co-defendants Harris and Ruffin not guilty. The jury deliberated for an additional two days before returning its verdicts of guilty against the remaining defendants, appellants Overton and Christopher Turner.

This court affirmed the convictions on direct appeal.[6] In doing so, we acknowledged "some conflict in the testimony of the government's witnesses regarding exactly when each appellant joined in the beating," but stated that "there was overwhelming evidence that each of them was involved at one time or another."[7] For the most part, appellants' claims on direct appeal do not bear directly on the claims now before us.[8]

II. Appellants' Post–Conviction Motions: *Brady* and IPA Claims

In support of their *Brady* and IPA claims, appellants presented witness recantations, expert witness testimony, and other evidence at the hearing on their post-conviction motions in 2012 in an effort to show that the government withheld materially exculpatory and impeachment evidence from them at trial, and that they were ac-

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[6] *See Catlett v. United States*, 545 A.2d 1202 (D.C. 1988); *Turner v. United States*, Nos. 86-314 & 90-530 (D.C. 1992) (Mem. Op. & J.).

[7] *Catlett*, 545 A.2d at 1206 n. 2; *see also id.* at 1209–10, 1217 (discussing the evidence against Christopher Turner and Overton, respectively).

[8] The exception is Yarborough's argument on direct appeal that the trial court erred in denying his motion to suppress his videotaped statement without considering his age, education, and experience with the criminal justice system. *Id.* at 1207. We discuss this below in connection with Yarborough's ineffective assistance claim.

tually innocent of Fuller's robbery, kidnapping, and murder. Appellant Yarborough also testified and presented evidence in support of his ineffective assistance claim. In opposition, the government presented testimony from the investigating detectives and the prosecutors who worked the case in 1984 and 1985. This section of our opinion discusses the evidence relevant to appellants' *Brady* and innocence claims; we discuss the evidence particularly relevant to Yarborough's ineffective assistance claim in a later section.

A. Witness Recantations

1. Calvin Alston and Harry Bennett

Alston and Bennett had finished serving their sentences when they took the stand in 2012 to recant their trial testimony. Each maintained that he knew nothing about Fuller's murder but had been pressured by police into making a false confession and, ultimately, testifying falsely at trial.

Alston was arrested and questioned by Detectives McGinnis and Sanchez about the murder for two-and-a-half hours on November 29, 1984. According to Alston, the detectives yelled at him, accused him of lying, and threatened him with a life sentence if he did not admit his complicity in the murder. They accused him of acting as a lookout for Rouse, Yarborough, Overton, Smith, and others they named. Eventually, Alston testified, he "gave in to their drilling" and falsely admitted to being the lookout and witnessing the attack on Fuller from the end of the alley.

This, Alston said, did not satisfy his interrogators. Detective Sanchez angrily told Alston he could not have seen or heard what was going on in the alley if he merely stood

at the end of it. The detectives insisted that he had witnessed Fuller being beaten and sodomized in the garage and urged him to "come all the way clean" and put himself "in the case." Ultimately, Alston testified, he acquiesced and concocted a story of having participated in the crime using the information the detectives provided concerning what happened and who did it. (Nevertheless, Alston still did not admit to personally assaulting Fuller or being the one who proposed robbing her, and he steadfastly denied having received any money from the robbery.) After rehearsing his story with the detectives, they turned on the video camera and recorded his statement.

Bennett, who was interrogated for about four hours after he was arrested on February 6, 1985, similarly claimed that the detectives refused to believe his denials, threatened him with a life sentence, and "kept hammering" at him until he eventually "started saying what was on the news" and repeating whatever the detectives said to him "until they got me to say I was involved." The detectives pressed him to incriminate others, including several of the appellants here, and he did so. Bennett's interrogation also culminated in a videotaped statement. During the videotaping, Bennett testified, the detectives turned the camera off to correct details in his story. At one point, Bennett claimed, he told them that everything he had said was a lie, and the detectives became angry, rewound the tape, and recorded over that portion. Later on, Bennett testified, he was shown part of Yarborough's videotaped statement and given documents pertaining to the case so that he could further tailor his testimony.

Alston and Bennett also claimed that the lead prosecutor in the Fuller case, Jerry Goren, instructed them to alter their testimony at trial. Alston asserted that Goren

told him he needed "to put my actual self in the violence that took place" to make his testimony more credible, and to "change the scenario" when other evidence conflicted with his account of the attack on Fuller. Alston said he complied with Goren's demands when, for example, he testified at trial that he himself came up with the idea to rob Fuller.[9] Bennett made comparable allegations. For example, in his videotaped statement, Bennett said he did not see Christopher Turner enter the alley or Catlett hit Fuller; at trial, he testified both of them participated in the beating. He changed his story, he claimed, "because that's what they told me to say."[10]

To rebut Alston's and Bennett's recantations and repudiate their allegations of misconduct, the government called Jerry Goren and Detectives McGinnis and Sanchez, among other witnesses. The detectives denied threatening Alston and Bennett with life sentences or telling them

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[9] Similarly, Alston retreated at trial from his previous statement that he saw Rouse hit Fuller in the back of the head with a two-by-four, and testified instead that he did not see where Rouse hit her, because Goren told him there was no evidence that Fuller was injured in the back of the head.

[10] To support the credibility of Alston's and Bennett's recantations, appellants presented other witnesses who testified to the detectives' heavy-handed interrogation tactics. In addition, over the government's objection, appellants called an expert on the subject of false confessions. The witness, Dr. Richard Leo, opined that certain features of the interrogations of Alston and Bennett, such as the detectives' use of deception, yelling, and threats or promises, were associated with a heightened risk of inducing false confessions. According to Dr. Leo, the errors and incongruities in the confessions of Alston and Bennett could be taken as "indicia of unreliability."

what to say or whom to name as Fuller's assailants.[11] They similarly denied Alston's claim that they rehearsed with him what he would say on camera and Bennett's claims that they interrupted the taping of his statement to excise his declaration that his confession was a lie, and that they showed him Yarborough's taped statement and documents containing information about the investigation. Goren likewise categorically denied telling Alston and Bennett what to say, or that they needed to change their testimony.

2. Melvin Montgomery and Linda Jacobs

Appellants also called Melvin Montgomery and Linda Jacobs to testify at the 2012 hearing. Their testimony proved to be unhelpful to appellants. Montgomery signed an affidavit in 2009 stating he lied on the stand in 1985 and that he saw appellants in the park at 8th and H Streets on October 1 only in the morning, not in the late afternoon (when Fuller was murdered). At the 2012 hearing, however, Montgomery disavowed the affidavit and denied perjuring himself at trial.

Linda Jacobs professed not to remember her trial testimony or much of anything else, but she insisted that she knew everything she said at trial was a lie because she was never in the alley on October 1. She vaguely claimed the police told her she was in the alley and "fed [her] information" about the murder, which she repeated to avoid being returned to her parents or accused of the crime herself. When the judge asked her what the government told

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[11] The detectives admitted, however, to playing good-cop-bad-cop, yelling, pointing, and slamming their hands on desks. They also acknowledged telling Alston and Bennett they would face greater consequences if they did not come clean and finger others.

her to say in 1985, she broke down emotionally and struggled to articulate how Fuller's murder made her feel.

B. Evidence Not Disclosed to the Defense

Appellants contended that the government withheld evidence that the defense could have used (1) to construct an alternative-perpetrator defense premised on the theory that Fuller was attacked and killed by a single individual (or at most a very small number of persons); and (2) to impeach the prosecution witnesses who identified appellants as the perpetrators.

1. Undisclosed Alternative–Perpetrator Evidence

a. The Witnesses in the Alley

According to information contained in the files of the police and the prosecutors, three people—Jackie Watts, Willie Luchie, and Ronald Murphy—told investigators that at around 5:30 p.m. on October 1, they happened to be walking through the alley and by the garage where Fuller was murdered. Luchie and Watts heard the sound of groans coming from inside the garage. (Murphy recalled Watts saying she heard something like a groan, though he did not claim to have heard anything himself.) According to Luchie, both doors of the garage were closed at this time. The trio continued on their way without investigating the source of the groans. This information was not disclosed to the defense. At the 2012 hearing, Goren agreed that if the witnesses heard groaning at 5:30 p.m., it meant Fuller was still alive at that time. He also agreed that if (counterfactually, in his view) the assault was still in progress at that time, it could not have involved more than one or a very few assailants.

b. James McMillan

James McMillan is one of two persons appellants claim they could have argued at trial was the likely alternative, sole perpetrator of Fuller's murder had the government not withheld information about him.

At trial in 1985, William Freeman, the street vendor who discovered Fuller's body, testified that as he waited for the police to come, he saw two men run into the alley from 9th Street and stand very close to the garage for a few minutes. Freeman earlier had seen the two men walking up and down 8th Street. One of the men appeared to be concealing an object under his coat. When the police arrived, the two men ran away up the alley towards I Street.

What Freeman saw was, of course, known to the defense. What the defense did not know, and the government did not disclose, was who the two men were. Freeman had identified them to the police as James McMillan and Gerald Merkerson. It was McMillan who appeared to be hiding something under his coat.

McMillan was a potential suspect in the police investigation. Two other witnesses told police they saw him at the alley at the same time Freeman did, and they confirmed Freeman's observations of his suspicious behavior. (These witnesses also were not disclosed to the defense.) In addition, the police knew that McMillan lived on 8th Street about three doors down from the alley and that he had violently assaulted and robbed two other middle-aged women walking in the vicinity three weeks after Fuller's

death.[12] But although the police included McMillan's photograph in the album they showed witnesses to try to identify the persons responsible for Fuller's murder, the government did not obtain sufficient evidence to indict him.[13]

At the motions hearing in 2012, appellants presented information about McMillan's subsequent activities following his conviction of the two robberies that he committed in October 1984. McMillan was sentenced to serve eight to twenty-five years in prison. Two months after he was released from prison in July 1992, he killed a 22–year–old woman ("A.M.") in an alley behind the 500 block of 8th Street Northeast, only a few blocks from where Fuller was murdered. This crime had some striking similarities to the attack on Fuller: McMillan abducted A.M. as she walked down the street and dragged her to a secluded spot in the alley, ransacking her personal belongings and leaving them strewn along the path of abduction.

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[12] McMillan committed the first of these robberies on October 24, 1984, in an alley behind the 1100 block of K Street Northeast. He approached the victim from behind, knocked her to the ground, grabbed her purse and fled. The next day, McMillan and a companion assaulted a woman in the 600 block of 12th Street Northeast. One of the two struck her in the face, breaking her nose, and stole the bag she was carrying.

[13] With two exceptions, no one directly implicated McMillan in the murder. The exceptions were as follows. First, as appellants were aware, James Campbell (the co-defendant whose case was severed) gave a videotaped statement to the police, and in it he named McMillan as one of several individuals congregating in the park at 8th and H Streets who participated in the attack on Fuller. Second, when Christopher Taylor (whom Rouse called at trial to support his alibi) was interviewed by police, he identified McMillan from his photograph as having been part of the group that accompanied Rouse into the alley. Campbell and Taylor subsequently disavowed their statements, and the government realistically could not have used them to prosecute McMillan.

After forcing A.M. into a narrow space behind a parked car, McMillan stripped off her underwear, beat her ferociously, and sodomized her. A.M. suffered grievous injuries and died three days later. McMillan was convicted of her murder and remains incarcerated.

Appellants argued that this was powerful evidence supporting the thesis that it was McMillan who murdered Fuller. In support of that thesis, they presented Dr. Richard Callery, a forensic pathologist, who testified that the cause of death for both Fuller and A.M. was blunt force trauma to the head and torso, and that each victim had suffered a traumatic anal sodomization resulting in severe internal injuries. Dr. Callery could not say the two murders were "signature crimes," but he testified that, in his experience, anal sodomy with an object occurred in considerably less than one percent of homicide cases. In addition to Dr. Callery's testimony, appellants presented a stipulation that, if he were called, an expert in sexual dysfunctions would testify that someone who commits an act of violent anal sodomy is likely to commit the act more than once.

c. James Blue

Other information not disclosed to the defense concerned an accusation against a man named James Blue, a habitual criminal who, by 1984, had served time for assault and had a record of arrests for rape, sodomy, and armed robbery. On October 26, 1984, a police lieutenant named Frank Loney happened to be interviewing a woman named Ammie Davis, who was alleging police misconduct in connection with her arrest for disorderly conduct. According to Loney's written report of the interview, Davis inquired what would happen if she gave the

officer "something on a homicide." Insisting that she did not want to get involved and would not testify in court, Davis proceeded to state that someone who just got out of jail on October 1 killed a woman that same day "for just a few dollars" in an alley off of H Street. At first Davis said she was present when the man committed the murder; she then said she was not "with" him and only saw him grab the woman by the back of the neck and pull her into the alley.[14] Davis said she was with her girlfriend "shooting stuff" when this happened and that her girlfriend saw it too. Davis refused to divulge her girlfriend's name but said she and her girlfriend would call the lieutenant the following week. At this point in the conversation, Lieutenant Loney asked Davis to tell him the man's name. After hesitating and saying she did not want to talk about it, Davis responded that "James Blue did it."

Davis was reluctant to say anything more. She refused to give a written or recorded statement and declared that she would not "go to court." Acknowledging that she was afraid of Blue, she brought the interview to a close with the assurance that she would call Lieutenant Loney and let him talk to her girlfriend. Davis never did call back, however.

Lieutenant Loney filed his report of Davis's statement without bringing it directly to the attention of the detectives who were investigating Fuller's murder. It did not come to their attention until August 1985.[15] Goren then proceeded to interview Davis on August 8 and 9. At the

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[14] When asked whether the man used a weapon, Davis said "he beat the f**k out of her."

[15] Detective McGinnis recalled asking Loney why he had not alerted them. Loney told him he did not believe what Davis had said.

hearing in 2012, he recalled her as being "not serious" and "very playful" in their meeting and having nothing to add to what she previously had said about Blue.

Goren testified that he ultimately decided not to inform the defendants in the Fuller case of Davis's allegation because he "believed completely and strongly that Ms. Davis had no evidence in this case and that she was totally incredible." Goren came to that conclusion because Davis had given Loney two different versions of her story; she was unable to provide any further details or any information that could be corroborated; the only information she could provide about the girlfriend who purportedly would have confirmed her account was that her nickname was "Shorty"; Davis previously had accused Blue of another, unrelated murder and provided information that was determined to be false[16]; and the prosecutors were confident in their body of evidence pointing elsewhere, i.e., at appellants and the other charged defendants. No other evidence implicated Blue in Fuller's murder. Goren admitted, though, that Davis accurately stated that Blue was released from prison on October 1, and that she evidently knew where Fuller was murdered and that she was not attacked with a knife or a gun.

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[16] Goren learned about Davis's prior accusation of Blue in another homicide investigation from an Assistant United States Attorney who had conducted that investigation and who was assisting Goren with the Fuller case.

On October 9, 1985, prior to the start of appellants' trial, James Blue shot and killed Ammie Davis. He was convicted of her murder and died in prison in 1993.[17]

2. Impeachment Evidence

The government failed to turn over four types of impeachment evidence.[18] First, the government inadvertently did not disclose that Kaye Porter lied to the police at Carrie Eleby's behest. During one of Eleby's early interviews with the police in November, in which she denied having witnessed Fuller's murder, she claimed that Alston had confessed his involvement in the crime to her. Porter, who accompanied Eleby to the interview, corroborated this claim. Porter later admitted to the police that she did not witness the conversation between Eleby and Alston, and that she had lied about it at Eleby's request. Neither Porter's lie nor Eleby's suborning of it were disclosed to the defense.

Second, the government did not disclose its knowledge of Eleby's extensive PCP use. At trial, she testified that she smoked PCP on October 1, but never before or since. Goren and other members of the investigation and prose-

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[17] Goren testified that he reviewed the homicide file relating to Davis's murder and determined that it was unrelated to her accusation of Blue in the Fuller case.

[18] Appellants (somewhat vaguely) charge that the government failed to turn over a fifth category of impeachment evidence, to the effect that Carrie Eleby and Linda Jacobs initially denied witnessing the attack on Fuller and stood by their denials for months. But Goren testified that he gave the defense Eleby's grand jury testimony in which she acknowledged her denials, and the trial record suggests that the defense knew of Jacobs's denials, because she was asked about it on cross-examination.

cution team knew this was not the truth. Eleby was actually under the influence of PCP even when she viewed photos and identified persons who were in the alley, and Goren's notes indicate that she "had started using PCP again" later in the investigation.

Third, the government did not disclose grand jury testimony supporting the alibi of a man named Lamont Bobbitt, who Alston testified was present in the park and in the alley when Fuller was murdered. Bobbitt told the police he was elsewhere that evening, and in testimony before the grand jury, six witnesses corroborated his alibi. (The prosecutors did not believe the alibi because of contradictions in the testimony, but they decided they nonetheless lacked sufficient evidence to charge Bobbitt with Fuller's murder.)

Finally, the government did not disclose evidence that could have been used to impeach Maurice Thomas. At trial, Thomas testified that after he witnessed the attack in the alley, he ran home and told his aunt "Barbara" what he had seen. He claimed that Barbara told him not to say anything to anyone else. The police interviewed Barbara (whose real name was Dorothy Harris), and she said that she did not recall Thomas ever telling her anything about the attack.

C. Expert Testimony

Two expert witnesses testified in 2012 in support of the theory that Fuller probably was killed by one to three attackers rather than a large group, though they both admitted it was possible a larger group was involved. Dr. Callery (who also testified to the similarities between the murders of Fuller and A.M.) examined the autopsy report and opined that Fuller's injuries were not as extensive or

widely distributed as he would have expected to see from a large-group attack, even if some members of the group merely held the victim and did not inflict injury themselves. Dr. Callery agreed, however, with the 1985 medical examiner's conclusion that it was impossible, from looking at the autopsy report, to say specifically how many people assaulted Fuller.

The second witness was Larry McCann, an experienced homicide investigator who testified as an expert in violent crime analysis and crime scene reconstruction. It was McCann's opinion, based on the autopsy report, crime scene photos and other investigation records, that the attack on Fuller was more likely committed by a single offender than by a large group of individuals acting together. Had there been multiple offenders, McCann testified, he would have expected to see the victim's clothing stretched, torn, or ripped, grab marks or abrasions on her ankles, legs, and wrists, more injuries, and multiple sexual assaults rather than the one. McCann conceded that, even in a group attack, some assailants might only strike minor glancing blows.

D. The Motions Judge's Decision

Judge Weisberg rejected appellants' IPA and *Brady* claims. As to the former, the motions judge found that appellants had "not come close to demonstrating actual innocence" because the witness recantations on which appellants relied were not credible. Beyond that, the judge also found "not particularly persuasive" the expert opinion testimony that Fuller likely was beaten by only one or a very few assailants, and appellants' argument that the similarities between the murder of Fuller and McMillan's

murder of A.M. proved that McMillan was Fuller's sole assailant.

Turning to appellants' *Brady* claims, the motions judge concluded there was no reasonable probability that the undisclosed evidence would have changed the outcome of the trial. This was so for three basic reasons: First, the judge noted, Ammie Davis's hearsay accusation against James Blue "was almost certainly inadmissible," and, in any event, it was "thoroughly discredited" and would not have convinced the jury to disbelieve the numerous eyewitness accounts of an attack by a large group of young men. "Not one of the approximately 400 other witnesses interviewed by the government mentioned James Blue as a possible perpetrator," the judge pointed out, "either alone or with others."

Second, the judge reasoned, the evidence pertaining to James McMillan was not material because no witness put him in the alley during the attack, and because even if he was present then, "it would not prove anything" about appellants since McMillan could have been a participant in the attack with them or merely a bystander. "For the 'McMillan evidence' to be material in the *Brady* sense," the judge added, "he would have had to have committed the crime by himself or with Merkerson to the exclusion of the petitioners, and that possibility flies in the face of all the evidence."

Third, the judge found the undisclosed impeachment evidence to be of little significance even when viewed cumulatively. While Kaye Porter's admission that she lied about hearing Alston's confession, at Eleby's request, could have been used to impeach Porter and Eleby, the nondisclosure was not material because Porter was a "relatively minor" witness at trial and Eleby was extensively

impeached at trial with her prior inconsistent statements and her admitted lies before the grand jury. Similarly, Eleby was cross-examined at trial about her use of PCP and additional evidence on that score would not have made a difference. Alibi testimony contradicting Alston's claim that someone other than appellants was present in the park likewise would have been of little help to appellants, the judge concluded, particularly since the alibi "may or may not have been truthful."[19] Lastly, the judge acknowledged that Maurice Thomas was "an important eyewitness because he was able to identify several of the [appellants] and had no apparent bias or motive to fabricate," and he thought it "at least arguable" that the government should have disclosed that Thomas's aunt did not recall his telling her that he had just seen someone attacked in the alley. Nevertheless, finding *inter alia* that Thomas testified convincingly at trial despite being cross-examined extensively, and that his aunt's denial could be explained by Thomas's testimony that she told him to forget what he had seen,[20] the judge concluded that even if Thomas had been impeached by his aunt's statement, "no juror would have concluded that he was making it all up."

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[19] Citing *Wu v. United States*, 798 A.2d 1083, 1089–90 (D.C. 2002), the judge also held that appellants were procedurally barred from raising a *Brady* claim based on the government's non-disclosure of alibis offered by witnesses whom Alston or Bennett claimed were present during the murder, because the trial judge had ruled that the government did not have to disclose such evidence and appellants did not appeal that ruling.

[20] The judge also cited Goren's impression, recorded in his contemporaneous case notes, that Thomas's aunt was "a bit of an alcoholic."

III. Analysis of Appellants' *Brady* Claims

A. *Brady* and the Applicable Standard of Review

Appellants invoke a constitutional duty of governmental disclosure in criminal cases that the Supreme Court recognized in *Brady v. Maryland*[21] over two decades before their trial: "The Due Process Clause of the Fifth Amendment requires the prosecution to disclose to the defense, upon request, material evidence—including impeachment evidence—that is favorable to the accused."[22] The purpose of this duty "is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur."[23] The failure to disclose materially favorable evidence constitutes a due process violation "irrespective of the good faith or bad faith of the prosecution"[24] and without regard to whether the evidence was actually known by the individual prosecutor, or merely by "others acting on the government's behalf in the case, including the police."[25]

"To determine on appeal whether the government, through its representatives in the trial court, has violated

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[21] 373 U.S. 83, 87 (1963).

[22] *Miller v. United States*, 14 A.3d 1094, 1106 (D.C. 2011). It is now clear that the suppression of materially favorable evidence is a violation of due process "regardless of [defense] request." *Kyles v. Whitley*, 514 U.S. 419 (1995) (citing *United States v. Bagley*, 473 U.S. 667, 682, 685 (1985)).

[23] *Bagley*, 473 U.S. at 675.

[24] *Brady*, 373 U.S. at 87.

[25] *Kyles*, 514 U.S. at 437.

its obligations under *Brady*, we consider: (1) whether the information in question is favorable to the accused; (2) whether this information was possessed and suppressed by the government, either willfully or inadvertently; and (3) whether that information was material" to guilt or punishment.[26] Appellants have the burden of proving a *Brady* violation.[27] In this case, although we think it may be doubted whether some of the undisclosed evidence in question was truly favorable to appellants, we need not linger over such doubts. The primary and dispositive question with respect to all of appellants' *Brady* claims is the question of materiality.

Evidence is material within the meaning of *Brady* "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[28] Materiality is "not a sufficiency of the evidence test."[29] Rather, evidence is material if it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."[30] *Brady* materiality must be assessed in terms of the cumulative effect of all suppressed evidence favorable to the defense, not on the evidence considered item by item.[31] The cumulative effect of a collection of suppressed evidence may undermine confidence in the outcome of the

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[26] *Vaughn v. United States*, 93 A.3d 1237, 1254 (D.C. 2014) (internal quotation marks omitted).

[27] *Mackabee v. United States*, 29 A.3d 952, 959 (D.C. 2011).

[28] *Miller*, 14 A.3d at 1115 (quoting *Bagley*, 473 U.S. at 682.

[29] *Kyles*, 514 U.S. at 434.

[30] *Id.* at 435.

[31] *Id.* at 421.

trial even where each piece of evidence, viewed in isolation, would be insufficient. Of course, just as the trial court did, "[w]e evaluate the tendency and force of the undisclosed evidence item by item; there is no other way. We evaluate its cumulative effect for purposes of materiality separately and at the end of the discussion[.]"[32]

Some past decisions of this court have reviewed a trial court's ruling on *Brady* materiality for "reasonableness."[33] Our more recent cases, following the reasoning of the dissent in *Farley v. United States*,[34] have questioned the aptness of that standard.[35] As Judge Ruiz pointed out in her *Farley* dissent, the Supreme Court has consistently reviewed *Brady* rulings *de novo*,[36] and a *de novo* standard

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[32] *Kyles*, 514 U.S. at 436 n. 10.

[33] *E.g.*, *Davies v. United States*, 476 A.2d 658, 661 (D.C. 1984) ("Where, as here, the trial court has determined that asserted *Brady* material would not have materially affected the verdict, the reviewing court is limited to a determination of whether that decision was reasonable. *United States v. Agurs*, 427 U.S. 97, 114 (1976). An independent review is precluded. *Id.* It cannot be said that the trial court's ruling on the *Brady*-based new trial motion was unreasonable.").

[34] 767 A.2d 225, 233 (D.C. 2001) (Ruiz, J., dissenting).

[35] *See Zanders v. United States*, 999 A.2d 149, 162 (D.C. 2010); *Watson v. United States*, 940 A.2d 182, 187 (D.C. 2008); *Powell v. United States*, 880 A.2d 248, 254–55 (D.C.2005); *see also Miller*, 14 A.3d at 1120; *id.* at 1129 n. 11 (Fisher, J., dissenting).

[36] *See Farley*, 767 A.2d at 233 ("No other conclusion can be reached from the Supreme Court's opinions in *Kyles*, *Bagley*, *Wood [v. Bartholomew*, 516 U.S. 1 (1995)] or *Strickler v.Greene*, 527 U.S. 263 (1999)], all of which exhaustively review the evidence, without expressing a deferential standard or, in fact, affording any deference to the lower courts' determinations.") (footnotes omitted). This seems to be one of the respects in which *Agurs*, the case that this court cited in

of review "is consistent with the origin of the *Brady* materiality test, which is derived from the prejudice prong for ineffective assistance of counsel—an inquiry which the [Supreme] Court has held presents a mixed question of law and fact."[37] Consequently, without resolving the issue of the proper standard of review, we latterly have "avoided applying the lesser 'reasonableness' standard [ ] where we have been able to conclude instead that even under *de novo* review, no material violation occurred."[38]

Notwithstanding our general adherence to *stare decisis*, we are not obligated "to follow, inflexibly, a ruling whose philosophical basis has been substantially undermined by subsequent Supreme Court decisions."[39] We think the proper approach is to recognize that a pure "reasonableness" standard of review is imprecise and does not meet the needs of the due process inquiry at stake in *Brady* cases. It is more accurate and appropriate to say, as we and other courts have said, that whether appellants have established a violation of *Brady* is a mixed question of fact and law.[40] "In that circumstance, we review the trial court's legal conclusions on a *de novo* basis and its factual

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Davies as mandating a deferential "reasonableness" standard of review, has been superseded.

[37] *Farley*, 767 A.2d at 233.

[38] *Zanders*, 999 A.2d at 162.

[39] *Frendak v. United States*, 408 A.2d 364 (D.C.1979).

[40] *Miller*, 14 A.3d at 1120; see also *Farley*, 767 A.2d at 234 n. 6 (Ruiz, J., dissenting) (citing federal cases).

findings under the clearly erroneous standard."[41] Materiality—defined as whether the government's failure to disclose exculpatory evidence undermines our confidence in the verdict—is, in the end, a legal conclusion.[42] Therefore, while we defer in this case to the motions judge's assessments of credibility, evaluations of the weight of the evidence and the inferences to be drawn therefrom, and findings of historical fact, so long as they have record support, we respect, but we do not accord comparable deference to, the judge's determination of the ultimate question of *Brady* materiality. With due appreciation for the fact-bound nature of that ultimate question, we must review it *de novo* on appeal.

Pursuant to the foregoing principles, we now proceed to discuss the significance of the undisclosed evidence at issue in this appeal—first on an item-by-item basis, and then cumulatively.

B. The Witnesses in the Alley

The statements of Watts, Luchie, and Murphy had the potential to advance appellants' single-perpetrator theory.[43] The groans heard by Watts and Luchie tend to show that Fuller was still alive between 5:30 and 5:45 p.m. And the fact that Luchie saw *both* garage doors closed, while

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[41] *Id.* (quoting *United States v. Joseph*, 996 F.2d 36, 39 (3d Cir.1993) (alteration omitted)); accord *Vaughn*, 93 A.3d at 1254.

[42] Whether we choose to characterize materiality as a question of law or of "ultimate fact" is of little moment. *See Miller*, 14 A.3d at 1120 n. 32 ("We also generally review *de novo* so-called findings of 'ultimate fact' . . . , since they are really conclusions of law.").

[43] Appellants contend that one, two, or at most three people killed Mrs. Fuller, but for ease of discussion, we shall refer to their view of the case as the single-perpetrator theory.

one of the doors was open when William Freeman came by around 6:00 p.m. and discovered Fuller's body, could be taken to suggest that the attack was then-occurring and that the true killer(s) opened one of the doors and fled in the interim. If the attack was in progress when Watts, Luchie, and Murphy walked by the garage, then as Goren acknowledged, it could not have been committed by a large group of people.

As the government argues, if Fuller was being assaulted when Watts, Luchie, and Murphy passed next to the garage, one might think they would have heard more noise; the fact that they heard only the sounds of groans would seem to imply that the attack was over by then and that Fuller's assailants were gone. Moreover, Luchie might have been mistaken in recalling that both garage doors were closed (Watts and Murphy did not say that), and even if they were, there was time for someone unknown to open one of the doors and depart before Freeman arrived and found Fuller's body. Despite these considerations, we agree with appellants that the alley witness evidence has potential weight in a cumulative materiality analysis.[44]

C. James McMillan Evidence

The government had reason to suspect James McMillan of having participated in Fuller's murder. He was a violent criminal prone to assaulting and robbing vulnerable women in the area; he was seen in the alley shortly after Fuller's murder, acting suspiciously and concealing an object under his coat; he fled when the police arrived;

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[44] *See Manson v. Brathwaite*, 432 U.S. 98 (1977) ("[E]vidence with some element of untrustworthiness is customary grist for the jury mill.").

and James Campbell and Christopher Taylor identified him as having joined in the attack (though Campbell's hearsay identification could not have been introduced in evidence at appellants' trial, Taylor presumably would have denied or disavowed it had he been asked, and their identifications of McMillan would not have supported a single-perpetrator theory). That McMillan committed a similarly heinous sexual assault and murder some years later only heightens the suspicion of his involvement. The parties disagree, however, as to whether the evidence of McMillan's other crimes is relevant to the *Brady* analysis.

1. The October 1984 Robberies

The parties disagree as to whether evidence of the two robberies McMillan committed in October 1984 would have been admissible at trial. Appellants and the government agree that the robberies did not amount to "reverse *Drew* evidence," i.e., "evidence of a recent similar crime with a distinct modus operandi—which the defendant could be shown not to have committed."[45] The two robberies, in which the perpetrator attacked the victims, robbed them, and then fled without causing further harm, do not share a sufficiently "distinct modus operandi" with the assault on Fuller to justify the inference that the same person must have committed all three crimes.

Appellants contend, however, that evidence of the robberies committed by McMillan would have been admissible in support of a third-party perpetrator defense under

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[45] *Bruce v. United States*, 820 A.2d 540, 543 (D.C. 2003) (quoting *Newman v. United States*, 705 A.2d 246, 253 (D.C. 1997)).

Winfield v. United States.[46] Setting aside for the time being the separate question of whether evidence fairly implicating McMillan in the attack on Fuller would have raised sufficient doubts about appellants' participation in the attack to show a *Brady* violation, we think appellants are correct that McMillan's robberies would have been admissible in support of such a defense.

"*Winfield* evidence" is evidence offered to show that someone other than the defendant committed the crime. For such evidence to be admissible,

> there must be proof of facts or circumstances which tend to indicate some reasonable possibility that a person other than the defendant committed the charged offense. The focus of the standard is not on the third party's guilt or innocence, but on the effect the evidence has upon the defendant's culpability, and in this regard it need only *tend* to create a reasonable doubt that the defendant committed the offense.[47]

Winfield evidence is not limited to proof of the third party's motive and "practical opportunity" to commit the

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[46] 676 A.2d 1 (D.C. 1996) (en banc). On the distinction between reverse *Drew* evidence and *Winfield* evidence, see *Bruce*, 820 A.2d at 543–45. "Admissibility under the Winfield standard . . . is broader" than under the standard for reverse Drew evidence. *Id.* at 545.

[47] *Winfield*, 676 A.2d at 4 (internal quotation marks omitted). There is "no requirement that the proffered evidence must prove or even raise a strong probability that someone other than the defendant committed the offense." *Id.* (quoting *Johnson v. United States*, 552 A.2d 513, 517 (D.C. 1989)).

crime;[48] it also may include evidence that the third party committed "another crime like the one before the court."[49] The crimes "need not be identical" for such evidence to be admissible, if "the totality of the circumstances demonstrates a reasonable probability that the same person committed both offenses."[50] Conversely, "the trial court should exclude *Winfield* evidence if it 'is too remote in time and place, completely unrelated or irrelevant to the offense charged, or too speculative with respect to the third party's guilt.'"[51] And even if the proffered *Winfield* evidence satisfies the threshold requirement of relevance, the trial court has discretion to exclude it based on a determination that its marginal probative value is substantially outweighed by the risk of unfair prejudice, confusion of the jury, or similar considerations.[52] However, "[c]lose questions of admissibility should be resolved in favor of inclusion, not exclusion."[53]

Here, we think it reasonable to conclude that McMillan's commission of two other robberies in October 1984 would have corroborated the other evidence that he joined in the October 1 attack on Fuller. The government principally argues that the probative value of that corroboration would have been minimal, and substantially outweighed by the risk of unfair prejudice, because there were few

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[48] *Winfield*, 676 A.2d at 5.

[49] *Bruce*, 820 A.2d at 543 (quoting *Newman*, 705 A.2d at 254).

[50] *Bruce*, 820 A.2d at 544 (alteration and citation omitted).

[51] *Thomas v. United States*, 59 A.3d 1252, 1264 (D.C. 2013) (quoting *Resper v. United States*, 793 A.2d 450, 460 (D.C. 2002)).

[52] *Winfield*, 676 A.2d at 5.

[53] *Bruce*, 820 A.2d at 544 (citing *Winfield*, 676 A.2d at 6–7).

similarities between the two robberies and Fuller's murder.[54] We disagree, inasmuch as the three crimes all involved violent assaults and robberies of middle-aged women who were walking alone on the street, and all took place in the same neighborhood in a span of less than a month. That the attack on Fuller was far more vicious and severe than the other two robberies does not negate these points of similarity. We therefore are satisfied that a trial judge would be safely within her discretion in admitting the evidence of McMillan's robberies under *Winfield*; accordingly, they are relevant to the *Brady* materiality analysis.

2. The 1992 Murder of A.M.

We reach a different conclusion with respect to McMillan's murder of A.M. seven years after appellants' trial. Because evidence of this murder obviously could not have been presented at appellants' trial, it is not relevant to whether the government violated its *Brady* obligations. A *Brady* violation cannot be predicated on the government's failure to do the impossible and disclose evidence that does not yet exist. McMillan's murder of A.M. likewise has no bearing on the question of the materiality of any evidence that the government actually did withhold from the defense. This is so because materiality under *Brady* turns on a retrospective assessment of whether a past trial might have had a different outcome had available evidence not been kept from the defendant—not on whether new, previously unobtainable evidence not kept from the

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[54] The government also argues that McMillan would not still have been hanging around the garage when the police arrived had he been one of the assailants, but this is not entirely persuasive; appellants Catlett and Overton were still in the park across the street when the police came to the scene.

defendant might lead to a different result in a new trial. There are other procedures available for exploring whether new evidence calls for a new trial—for example, the procedures of the Innocence Protection Act that appellants employed in this case—but they are subject to different standards; simply put, "*Brady* is the wrong framework" to use for obtaining post-conviction relief based on new evidence.[55]

D. Ammie Davis's Accusation of James Blue

There is reason to doubt that Ammie Davis's accusation of James Blue would have carried significant weight with the jury, given her lack of credibility and the complete absence of other evidence associating Blue in any way with Fuller's murder. But we need not examine that question. Davis, having been murdered prior to the start of appellants' trial, was unavailable to testify at it. Her out-of-court statements accusing Blue did not fall within any exception to the rule against hearsay. Hence her statements would have been inadmissible as evidence that Blue killed Fuller. Evidence that is inadmissible cannot be material for *Brady* purposes unless there is a reasonable probability that its disclosure would have resulted in a different trial outcome because it is likely to have led to the discovery of other, admissible evidence favorable to the

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[55] *Dist. Attorney's Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52, 69 (2009) (holding that the *Brady* right of pretrial disclosure does not provide a post-conviction right of access to evidence for newly available DNA testing).

defense.[56] No such probability has been shown here. Appellants have not demonstrated any likelihood that they would have located and obtained helpful testimony from the girlfriend Davis mentioned, or that they would have discovered any other admissible evidence implicating Blue in Fuller's murder.

Appellants, citing *Chambers v. Mississippi*,[57] contend that due process would have required the trial court to admit Davis's statement for its truth in spite of the rule against hearsay. We disagree. As the Supreme Court has explained, the "fundamental" right of an accused in a criminal case "to present witnesses in his own defense"[58] is not "an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence."[59] "Evidentiary rules excluding evidence from criminal trials violate the constitutional

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[56] *See Wood v. Bartholomew*, 516 U.S. 1, 6 (1995) (holding that undisclosed polygraph results were not material where they were "inadmissible under state law, even for impeachment purposes," and the possibility that disclosure "might have led respondent's counsel to conduct additional discovery that might have led to some additional evidence that could have been utilized" was "mere speculation"); *United States v. Morales*, 746 F.3d 310, 314–15 (7th Cir. 2014) (finding the majority view in the federal courts of appeals, that inadmissible evidence may be material if it could have led to the discovery of admissible evidence, to be "more consistent" with *Wood* than "a rule that restricts *Brady* to formally admissible evidence") (citing cases); *United States v. Derr*, 990 F.2d 1330, 1335–36 (D.C. Cir. 1993) (rejecting *Brady* claim based on government's failure to disclose inadmissible hearsay of declarant who would be unavailable to testify at trial).

[57] 410 U.S. 284 (1973).

[58] *Id.* at 302.

[59] *Taylor v. Illinois*, 484 U.S. 400, 410 (1988).

right to present a defense only if they 'infringe upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve.'"[60]

In *Chambers*, the Supreme Court confronted two such dubious evidentiary rules. The defendant in that case was charged with murder. At trial, he sought to prove that another man named McDonald had confessed to the crime orally and in writing, but he was stymied by two Mississippi rules of evidence. First, he was prevented from cross-examining McDonald (who had repudiated his written confession) by Mississippi's common law "voucher" rule prohibiting a party from impeaching his own witness.[61] In addition, he was unable to present the testimony of three credible witnesses to whom McDonald had confessed orally, because Mississippi applied its hearsay exception for declarations against interest only to statements against pecuniary interest, and not to statements against the declarant's penal interest, regardless of their trustworthiness.[62]

The Supreme Court reversed Chambers's conviction, holding that "under the facts and circumstances of this

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[60] *Heath v. United States*, 26 A.3d 266, 276 (D.C. 2011) (quoting *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006)); *see, e.g.*, *United States v. Scheffer*, 523 U.S. 303, 309, 316–17 (1998) (rejecting a constitutional challenge to a rule excluding lie detector results because the rule was not arbitrary or disproportionate to the ends it was designed to serve).

[61] *Chambers*, 410 U.S. at 291–92.

[62] *Id.* at 292–94, 299.

case the rulings of the trial court [in combination] deprived Chambers of a fair trial" by unjustifiably interfering with his fundamental right to defend himself.[63] As the Court explained, while an accused exercising that right "must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence,"[64] the evidentiary restrictions imposed on Chambers were not designed or implemented to serve those purposes.

The rule that a party may not impeach his own witness was, in the Court's words, "a remnant of primitive English trial practice" that "bears little present relationship to the realities of the criminal process" in the present day.[65] The rule "has been condemned," the Court added, "as archaic, irrational, and potentially destructive of the truth-gathering process."[66] In addition, while the Court acknowledged that the "materialistic limitation" of the declaration-against-interest hearsay exception to statements against pecuniary interest "might serve some valid state purpose by excluding untrustworthy testimony" in some cases, "[t]he hearsay statements involved in this case were originally made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability."[67] Each confession was made "spontaneously to a close acquaintance shortly after the murder had oc-

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[63] *Id.* at 303.

[64] *Id.* at 302.

[65] *Id.* at 296.

[66] *Id.* at 296 n. 8.

[67] *Id.* at 299–300.

curred"; "each one was corroborated by some other evidence in the case"; "each confession here was in a very real sense self-incriminatory and unquestionably against [the declarant's] interest"; and "[f]inally, if there was any question about the truthfulness of the extrajudicial statements, McDonald was present in the courtroom and was under oath" and subject to cross-examination and observation by the jury.[68] Given also that McDonald's out-of-court confessions were "critical" to Chambers's defense, implicating his "constitutional rights directly affecting the ascertainment of guilt," the Court concluded that Mississippi's "hearsay rule may not be applied mechanistically to defeat the ends of justice."[69]

It is plain that this case is nothing like *Chambers*. Davis's statement implicating Blue in Fuller's murder would have been excluded at appellants' trial pursuant to a routine and uncontroversial application of the basic rule against hearsay; unlike the statements against penal interest in *Chambers*, it did not even arguably fall within any of the recognized hearsay exceptions for statements "made under circumstances that tend to assure reliability and thereby compensate for the absence of the oath and opportunity for cross-examination."[70] The Supreme Court cast no doubt in *Chambers* on the constitutionality of excluding such ordinary hearsay evidence when offered by the defendant in a criminal trial. On the contrary, the Court acknowledged that "perhaps no rule of evidence has

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[68] *Id.* at 300–01. "McDonald's presence," the Court observed, "deprives the State's argument for retention of the penal-interest rule of much of its force." *Id.* at 301 n. 21.

[69] *Id.* at 302.

[70] *Id.* at 299.

been more respected or more frequently applied in jury trials than that applicable to the exclusion of hearsay," and it agreed that criminal defendants "must comply" with such established rules.[71] As the Court said, the rule against hearsay is

> grounded in the notion that untrustworthy evidence should not be presented to the triers of fact. Out-of-court statements are traditionally excluded because they lack the conventional indicia of reliability: they are usually not made under oath or other circumstances that impress the speaker with the solemnity of his statements; the declarant's word is not subject to cross-examination; and he is not available in order that his demeanor and credibility may be assessed by the jury.[72]

Every one of the Court's enumerated reasons why hearsay is excluded as untrustworthy applies to Davis's statement. In short, the exclusion of that statement on hearsay grounds would not have been arbitrary or disproportionate to the purposes that the rule against hearsay is designed to serve. It therefore would not have violated appellants' due process rights. The Constitution does not displace the hearsay rule in this case.[73]

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[71] *Id.* at 302.

[72] *Id.* at 298.

[73] Appellants argue that if the government had disclosed Davis's statement when the prosecutors first learned of it in August 1985, her "transience and drug use could have caused defense counsel to pro-

Arguably the fact that Davis accused Blue of complicity in Fuller's murder would have been admissible for the non-hearsay purpose of showing that the government's investigation of the crime was (in this one respect at least) less than diligent. Suppressed evidence of an inadequate investigation is potentially material.[74] Although the government is correct that Davis's statement might nevertheless have been excluded as more prejudicial than probative, it is enough to say that the trial judge would have had discretion to admit it for this limited purpose. On the other hand, if the evidence had been admitted for this limited purpose, we think its impact would have been negli-

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cure an admissible statement from her in the event she became unavailable." We do not see how appellants would have accomplished this. Depositions to preserve testimony for trial are disfavored in criminal cases, and the burden is on the party seeking a deposition to demonstrate "exceptional circumstances" necessitating it. *See* Super. Ct. Crim. R. 15(a); *United States v. Kelley*, 36 F.3d 1118, 1124 (D.C. Cir. 1994). Among other things, this normally calls for a showing that the witness will be unavailable to testify at trial, id. at 1125—a showing appellants could not have made prior to Davis's death.

Appellants suggest they could have asked Davis to prepare a statement about Blue's involvement in Fuller's murder that would have been admissible at trial in case of her unavailability through another witness under the hearsay exception for past recollection recorded. *See Mitchell v. United States*, 368 A.2d 514, 517–18 (D.C. 1977). But appellants could not have satisfied the requirements for admission under that exception because such a statement would not have been made at or near the time of the putative assault by Blue on Fuller, and because it does not appear appellants could have called a witness who would have been able to vouch for the accuracy of the statement from personal knowledge of that event. *See id.*

[74] *See Kyles v. Whitley*, 514 U.S. 419, 445 (1995) (holding statements material because they "would have raised opportunities to attack . . . the thoroughness and even the good faith of the investigation").

gible absent any showing either that more diligent investigation of Blue would have been productive, or that a lack of thoroughness went beyond the belated follow-up with Ammie Davis and infected the investigation in other ways so as to undermine the charges against appellants. Neither showing would have been made.[75] And evidence that the government performed a less than thorough investigation of the allegation against Blue would have had little likelihood of persuading the jury that a *different person*—i.e., James McMillan—was the true killer. To the contrary, the government would have been able to demonstrate that the investigation was indeed quite a thorough one overall, involving over four hundred interviews, and that McMillan's culpability was examined.

Appellants further argue that even if Davis's statement itself was inadmissible, it might have led them to discover admissible evidence that could have affected the outcome of the trial in their favor.[76] However, appellants have not identified any such evidence that might affect

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[75] We presume, of course, that the jury would obey a limiting instruction and not consider Davis's statement as evidence that Blue himself murdered Fuller. *See, e.g., Knight v. Georgetown Univ.*, 725 A.2d 472, 488 (D.C. 1999).

[76] *Cf. United States v. Bagley*, 473 U.S. 667, 683 (1985) ("[T]he reviewing court may consider directly any adverse effect that the prosecutor's failure to respond [to a *Brady* request] might have had on the preparation or presentation of the defendant's case."); *Miller v. United States*, 14 A.3d 1094, 1108 (D.C. 2011) ("An important purpose of the prosecutor's obligations under *Brady* is to allow defense counsel an opportunity to investigate the facts of the case and, with the help of the defendant, craft an appropriate defense.") (internal quotation marks omitted); *Boyd v. United States*, 908 A.2d 39, 61 (D.C. 2006) ("[T]he prosecutor must make the materiality determination... with a view to the need of defense counsel to explore a range of alternatives in developing and shaping a defense.").

our evaluation of the materiality of the undisclosed evidence at issue. We note that appellants did not proffer that timely disclosure of Davis's statement would have enabled them to find and present favorable testimony from the girlfriend who supposedly could have corroborated Davis's accusation against Blue.

In sum, the evidence concerning James Blue contributes to the cumulative materiality of the undisclosed evidence only to the very limited extent it would have had value in demonstrating a slip-up in the government's investigation.

E. Impeachment Evidence

We agree with Judge Weisberg that the withheld impeachment evidence, whether considered piece-by-piece or in conjunction with the other undisclosed evidence, had little prospect of changing the result at trial. Although "impeaching information does not have a lesser standing in the context of the government's *Brady* disclosure obligations" than affirmatively exculpatory information,[77] it "can be immaterial . . . if it is cumulative and the witness has already been impeached by the same kind of evidence."[78] That principle applies to some of the impeachment evidence at issue here.

The fact that Kaye Porter initially lied to the police at Carrie Eleby's behest, to corroborate Eleby's story that she had not seen the assault and that Alston had confessed his involvement to her, could have been used to impeach

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[77] *Vaughn v. United States*, 93 A.3d 1237, 1254 (D.C. 2014).

[78] *Watson v. United States*, 940 A.2d 182, 187 (D.C. 2008); *see also Williams v. United States*, 881 A.2d 557, 562–63 (D.C. 2005).

both Porter and Eleby. But Porter provided evidence at trial only against appellant Catlett—she testified to a conversation in which she asked him about Fuller's murder, and he responded that he "didn't do nothing to her" and that "all he did was kick her and somebody else stuck the pole up in her" because "she wasn't acting right." This testimony was impeached with Porter's grand jury testimony that Catlett simply told her he "didn't do nothing to that lady." Moreover, the other evidence against Catlett was second only to that against Rouse: among other things, Alston, Bennett, Eleby, and Thomas all testified that they saw Catlett physically attack Fuller; Montgomery saw him in the park before the murder and watched him cross the street and head toward Fuller; Thomas also recalled hearing Catlett tell someone why he and Fuller's other assailants killed her; and Catlett had no alibi.

Eleby too was impeached with her prior false statements to the police and to the grand jury and contradicted by other witnesses, and as described above, her inability to remember and keep her facts straight also undermined her credibility. It is hard to see why the additional impeachment would have made a difference to the jury's assessment of Eleby's credibility.

The undisclosed evidence of Eleby's extensive PCP use was also of little consequence. Eleby's claim that she smoked PCP for the first and last time on October 1 was unbelievable on its face. Jacobs testified that she saw Eleby use PCP at other times, and even if the jury disbelieved most of Jacobs's testimony, it had no reason to doubt her assertion, otherwise unrelated to the case, that her close friend was a drug user.

We likewise are not persuaded that disclosure of the evidence contradicting Alston's assertion that Lamont

Bobbitt was one of the persons present in the park and alley at the time of Fuller's murder (i.e., the evidence supporting Bobbitt's alibi, which several witnesses corroborated in testimony before the grand jury) would have made a difference with respect to the jury's evaluation of Alston's credibility. The jury was willing to acquit Harris even though Alston testified that he was an active participant in the murder. We do not see how knowing that one other person (who was not another defendant at trial) whom Alston named as present was not actually there would have swayed the jury.

Finally, although Maurice Thomas's testimony may have been an important factor in the jury's verdicts, his aunt's statement (that she did not recall Thomas having told her about the attack on Fuller) was unlikely to have discredited Thomas in any significant way. One of the strengths of his trial testimony was his candid acknowledgement of what he could not remember, namely whether or not Christopher Turner and Smith were present in the alley. Because he never claimed excellent recall of every detail of what he saw, it was not significant that his aunt could not corroborate a relatively minor part of his testimony. And if, as Thomas testified, she had told him not to report what he saw, she had every reason to deny their conversation when she spoke to the police. Moreover, the jury was willing to convict even where it did disbelieve Thomas, for it found Overton guilty despite Thomas's claim that he was not in the alley.

In sum, we think none of the impeachment evidence was material individually, and that it adds little to any cumulative materiality analysis.

F. Cumulative Materiality of the Undisclosed Evidence

We may turn now to the question of the cumulative materiality of the undisclosed exculpatory and impeachment evidence. To reiterate, the question is whether there exists a reasonable probability that the result of appellants' trial would have been different had the evidence been disclosed to the defense. We have concluded that, in addressing this question, our primary focus must be on the potential value to the defense of (1) the testimony of Watts and Luchie that they walked past the garage where Fuller lay dying at around 5:30 p.m. and heard groans coming from inside, and that the garage doors were closed; and (2) the identification of James McMillan as the person seen acting suspiciously in the vicinity of the garage sometime after the murder. While we do not ignore the potential value to the defense of the impeachment evidence and the limited non-hearsay use that appellants could have made of Davis's accusation of James Blue, we think the contribution of that evidence would have been negligible for the reasons we have already given.

Appellants argue that the undisclosed evidence was valuable not because it exculpated any of them directly, but because it would have enabled them to present an alternative single-perpetrator theory of the crime (with expert witness support) as a counter-narrative to the prosecution's case: Watts and Luchie may have overheard the assault being committed by only a limited number of persons—perhaps only one—rather than the large group described by the prosecution witnesses; and McMillan, given his presence on the scene and criminal history, plausibly may have been one of that limited number of assailants, though no prosecution witness named him as such.

The physical (as opposed to the eyewitness) evidence of the attack adduced at trial arguably supported, or at least was not inconsistent with, a single-perpetrator theory, and there was some other evidence at trial to corroborate it.[79]

The fact remains that the government presented the testimony of several eyewitnesses, including two participants who admitted their own guilt, who did implicate appellants in a group attack. No witness to the attack who testified at trial disputed their overall description of how the crime was committed, and the eyewitnesses were corroborated by evidence of incriminating admissions by some of the appellants. It is true that the prosecution witnesses contradicted themselves and each other on various points, and some of them had potential motives to lie or other problems with their testimony. Moreover, no fingerprint, DNA, or other forensic evidence implicated any defendant.[80] But the undisclosed evidence (other than the impeachment evidence that we have discounted) did not take advantage of those weaknesses; it did not, for example, contradict the government witnesses' accounts, demonstrate their bias, or incorporate contrary forensic evidence pointing to perpetrators other than the defendants on trial.

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[79] Notably, perhaps, William Freeman testified at trial that throughout his day at 8th and H Streets, working as a street vendor, he never saw a large group of young people in the area, never saw anyone running towards or away from the vicinity of the garage, and never heard any shouts coming from the area of the garage.

[80] In 1985, when this case was tried, DNA analysis was in its infancy. In 2011, the trial court ordered DNA testing of swabs taken from Fuller's body, a semen sample from her pantyhose, various articles of her clothing, and a metal pole found at the scene, but the tests did not result in a derivable DNA profile.

Nor, we conclude, did the undisclosed evidence truly provide substantial support for a single-perpetrator theory of the crime, or any theory that excluded appellants as the perpetrators. The groans, undoubtedly Fuller's, that Watts and Luchie heard coming from the garage between 5:30 and 5:45 p.m. did not mean the assault was still occurring or that any assailant was still present. On the contrary, the fact that Watts and Luchie heard nothing else and saw no signs of any activity more likely indicated that the assault was over and that the assailants were gone. This was entirely consistent with the government's evidence, and provided no reason to doubt it, inasmuch as Fuller left her house around 4:30 p.m. and all of the witnesses described a fast-moving event lasting, in all probability, no more than a few minutes. Luchie's observation that both garage doors were closed shortly before Freeman found one of them open would have raised a question, but it too does not mean anyone was still in the garage with Fuller when Luchie passed by. It surely would not have been enough to turn a jury that found the government's witnesses credible, as this jury did. It is far more likely, in our view, that the jury would have believed that Luchie was mistaken, or that someone came upon the scene and opened the garage door in the interval between Luchie's departure and Freeman's arrival, than that the jury would have thought it plausible that all the government's witnesses were lying and that Luchie had stumbled upon an assault in progress.

The evidence regarding James McMillan perhaps could have led the jury to suspect that he participated in the attack on Fuller, notwithstanding the fact that he was not charged and no eyewitness said he was involved. Alternatively, the jury might have suspected that McMillan

arrived on the scene only after Watts and Luchie departed (but before Freeman arrived), and that he and his companion Merkerson looked in the garage—providing an explanation for Luchie's and Freeman's observations of the garage door that did not rely on the supposition that the assailants were still present when Luchie was there.[81] But we think the jury, even if it had heard from Watts and Luchie, would have had no substantial reason to suspect McMillan was the *sole* perpetrator of Fuller's murder, or that he was one of only a few assailants. Even if he was involved in it, his involvement was entirely consistent with the government's evidence that a large group including Alston, Bennett, and appellants committed the crime; McMillan simply could have been another member of that group. (Indeed, had there been a focus on McMillan at trial, the jury presumably would have learned what the government did to investigate his involvement, and perhaps also that Christopher Taylor had implicated him as a participant in the large group attack.)

Moreover, a theory that McMillan could have been the sole perpetrator of the attack on Fuller, or only one of two or three perpetrators, would have been exceedingly implausible and difficult for the jury to accept—and not only because of the dearth of any evidence inculpating him. To think McMillan could have committed the crime himself, the jury would have had to think not only that all the government witnesses were lying or mistaken about every defendant at trial, but that Alston and Bennett, the government's two cooperating witnesses, were innocent even

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[81] It is not implausible that McMillan heard about the attack and decided to look in out of curiosity; nor that he carried away something from the garage, explaining his suspicious behavior.

though they had each pleaded guilty to homicide and continued to admit their guilt. That would not have been a plausible claim to make to the jury. It would have been about as daunting for the defense to contend that McMillan committed the crime with just one or two accomplices. Those accomplices would surely have to have been Alston and Bennett (which begs the question of Merkerson's involvement), but if they were going to admit their own guilt and cooperate as part of their plea bargains, there was no apparent reason why they would have shielded McMillan.[82]

Our conclusion is the same for each appellant individually. Overton and Christopher Turner point to the fact that the jury found it most difficult to convict them. It is true that in some ways the evidence against these two was weaker than that against their co-defendants. Maurice Thomas could not remember whether Christopher Turner was in the alley and affirmatively denied seeing Overton there, and Vincent Gardner did not contradict

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[82] A far more plausible contention that the attack on Fuller was committed by a small group (one that excluded the defendants on trial) would have been that Alston and Bennett were the sole perpetrators. The government's withholding of evidence did not prevent appellants from raising such a defense at trial. Virtually all the evidence appellants have marshaled against the prosecution's claim of a large group attack—e.g., the expert testimony of Dr. Callery and McCann, Freeman's trial testimony that throughout his day at 8th and H Streets, he never saw a group of young people congregating in the park or engaging in any attack—was available to the defense in 1985. In addition, Alston and Bennett's plea bargains furnished them an identifiable motive to falsely implicate others, and every prosecution witness was vulnerable to impeachment or other challenge on cross-examination in one way or another. Perhaps the testimony of Watts and Luchie would have lent additional support to a theory that Alston and Bennett were the only perpetrators; but for the reasons we have discussed, it would have been slight support at most.

these two defendants' alibis the way he did those of other defendants. But Overton, Christopher Turner, and the other appellants are similarly situated with respect to the way in which appellants contend the undisclosed evidence regarding the number of assailants and McMillan's possible involvement could have undermined the government's case against them. The evidence either would have provided significant ammunition in support of a single-perpetrator defense or not (and we conclude not). It had no bearing on whether any one individual defendant was part of a large group attack.

This case is not like *Kyles* or *Miller*, the two cases on which appellants principally rely. In those cases, there was no dispute as to how the crime occurred, only a dispute as to the identity of the perpetrator. In each case, the *Brady* violation was based on the suppression of substantial evidence that directly undercut the prosecution's proof of identity and supported the most plausible third-party perpetrator claim by the defense.[83]

Here, the undisclosed evidence (aside from the inconsequential impeachment evidence) would not have directly contradicted the government's witnesses or shown them to be lying, and it did not tend to show that any given

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[83] In *Kyles*, the prosecution concealed statements by eyewitnesses to a murder that contradicted their identification of the defendant, and statements by the putative alternative perpetrator (along with other evidence) suggesting he had framed the defendant and was himself guilty of the crime. *See* 514 U.S. 419, 441–49 (1995). In *Miller*, where the defendant was charged with assault with intent to kill, timely disclosure of the *Brady* material—an eyewitness's grand jury testimony indicating that the perpetrator of a shooting was left-handed (unlike the defendant)—would have helped the defendant establish the guilt of an alternative suspect. *Miller v. United States*, 14 A.3d 1094, 1116 (D.C. 2011).

appellant was misidentified. Rather, what is at issue is the basic structure of how the crime occurred. This makes the burden on appellants to show materiality quite difficult to overcome, because it requires a reasonable probability that the withheld evidence (in its entirety, and however appellants would have developed it) would have led the jury to doubt *virtually everything* that the government's eyewitnesses said about the crime. It would be different, for example, if the government had suppressed evidence of the kinds of allegations Alston and Bennett made in their later recantations. That, if believed, would have given the jury a basis on which to doubt the government's entire case. The same might be true if the government had suppressed credible and admissible evidence directly contradicting the accounts of the crime provided by the eyewitnesses. Here, however, the sum of the undisclosed evidence did not rise to that level of significance. We agree with the motions judge that, even if all that evidence had been disclosed in a timely and appropriate fashion, appellants have not demonstrated a reasonable probability that the result of their trial would have been different. The withheld evidence cannot "reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."[84]

IV. Analysis of Appellants' IPA Claims

The IPA[85] allows a convicted person to move for a new trial or vacatur of his conviction at any time "on grounds

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[84] *Kyles*, 514 U.S. at 435.

[85] D.C. Code §§ 22–4131 to 4135 (2012 Repl.).

of actual innocence based on new evidence."[86] "Actual innocence" means "the person did not commit the crime of which he or she was convicted."[87] "New evidence," as relevant here, is evidence that was "not personally known and could not, in the exercise of reasonable diligence, have been personally known to the movant at the time of the trial."[88] In hearing a claim brought under the IPA, the court "may consider any relevant evidence," but must consider, *inter alia*,

> (A) The new evidence; (B) How the new evidence demonstrates actual innocence; (C) Why the new evidence is or is not cumulative or impeaching; [and] (D) If the conviction resulted from a trial, and if the movant asserted a theory of defense inconsistent with the current claim of innocence, the specific reason the movant asserted an inconsistent theory at trial.[89]

A defendant is entitled to a new trial if he can show his actual innocence by a preponderance of the evidence.[90] If he can demonstrate his actual innocence by clear and convincing evidence, the court must vacate the conviction with prejudice.[91]

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[86] *Id.* § 22–4135(a).

[87] *Id.* § 22–4131(1).

[88] *Id.* § 22–4131(7)(A).

[89] *Id.* § 22–4135(g)(1).

[90] *Id.* § 22–4135(g)(2).

[91] *Id.* § 22–4135(g)(3).

We review the denial of a motion to vacate a conviction or for a new trial under the IPA for abuse of discretion.[92] In doing so, "we must give great deference to the trial court's role as the trier of fact on the ultimate issue of 'actual innocence' under the IPA, and thus we apply the clearly erroneous standard of review to the trial judge's rejection of alleged newly discovered evidence offered to prove 'actual innocence.'"[93]

Appellants' claims of actual innocence depend on the credibility of the recantations by four witnesses who testified against them at trial, and in particular on the recantations by Alston and Bennett. The motions judge concluded that appellants "have not come close to demonstrating actual innocence" because he found the recantations to be "not worthy of belief." Such a credibility determination, made after the judge had the opportunity to hear the recanting witnesses' live testimony and observe their demeanor, may be overturned only if "it is wholly unsupported by the evidence."[94]

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[92] *Richardson v. United States*, 8 A.3d 1245, 1248 (D.C. 2010); *see also Mitchell v. United States*, 80 A.3d 962, 971 (D.C. 2013) ("To the extent that the statute affords the trial court discretion in its application of the IPA, we review for abuse of discretion.") (quoting *Veney v. United States*, 936 A.2d 811, 822 (D.C. 2007), as modified, 936 A.2d 809 (D.C. 2007)).

[93] *Richardson*, 8 A.3d at 1249 (internal citation omitted); see also D.C. Code § 17–305 (2012 Repl.) (setting out the standard of review of bench verdicts).

[94] *Godfrey v. United States*, 454 A.2d 293, 301 (D.C. 1982); *see also Johnson v. United States*, 33 A.3d 361, 371 (D.C. 2011) (Where a motion for a new trial is based on the recantation of a witness, "[i]f the trial court determines that the recantation is not credible, that determination ends the inquiry.") (citation omitted); *Bell v. United States*,

As the motions judge noted, witness recantations in general are "properly viewed with great suspicion" because they are "very often unreliable and given for suspect motives,"[95] among other reasons. Alston and Bennett's recantations in particular were suspect, the judge observed, for to accept them "one must begin by suspending one's disbelief that a person would plead guilty to murder (Alston) and manslaughter and robbery (Bennett) and accept a sentence of many years in prison, all based on lies the police pressured them to tell against themselves and their close friends who, based on those lies, would be convicted and spend the rest of their lives in prison." Beyond

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871 A.2d 1199, 1201 (D.C. 2005) (same, under the IPA). This accords with the usual rule in an appeal from a bench trial that "[a]n appellate court will not redetermine the credibility of witnesses where, as here, the trial court had the opportunity to observe their demeanor and form a conclusion." *In re S.G.*, 581 A.2d 771, 775 (D.C. 1990) (quoting *WSM, Inc. v. Hilton*, 724 F.2d 1320, 1328 (8th Cir. 1984)); accord *David v. United States*, 957 A.2d 4, 8 (D.C. 2008) ("This court will not 'substitute its judgment for that of the fact-finder when it comes to assessing the credibility of a witness . . . based on factors that can only be ascertained after observing the witness testify.'") (quoting *Robinson v. United States*, 928 A.2d 717, 727 (D.C. 2007)).

[95] *Dobbert v. Wainwright*, 468 U.S. 1231, 1233–34 (1984); *see also, e.g., Meade v. United States*, 48 A.3d 761, 766 (D.C. 2012) ("It has long been established that recanting affidavits and witnesses are looked upon with the utmost suspicion by the courts.") (quoting *United States v. Kearney*, 682 F.2d 214, 219 (D.C. Cir. 1982); internal quotation marks and brackets omitted); *V.C.B. v. United States*, 37 A.3d 286, 291 (D.C. 2012) ("[C]ourts often view recantations of previous accusatory statements with suspicion or skepticism, in part because witnesses offering recantations are often facing radically different pressures than . . . they were at the time of the initial trial.") (internal citations and quotation marks omitted); *Godfrey*, 454 A.2d at 300 n. 26 ("[W]itnesses may recant for numerous reasons that have nothing to do with furthering truth or justice.").

that, the judge explained the evidentiary basis for his refusal to credit Alston and Bennett as follows:

> The court had an opportunity to hear their testimony under oath, observe their demeanor, compare it to their demeanor on their videotaped interrogations on November 29, 1984 (Alston), and February 6, 1985 (Bennett), review their trial testimony under oath, and compare their testimony to the testimony of all the other witnesses at trial who placed some or all of the petitioners at the scene. In this context, the current testimony of Alston and Bennett that they were not at 8th and H Streets on October 1, 1984, and that they were forced by the police to say they were there and to name the others who were there is nothing short of preposterous. The scene in the alley on October 1, 1984, was crowded and chaotic. Alston and Bennett may have gotten some facts wrong and may have left certain things out or distorted the truth to minimize their own involvement or to protect others, but the basic facts implicating these petitioners and describing a crime perpetrated by a large group were corroborated by too many other witnesses not to be believed. The notion that Alston and Bennett were not present and made it all up cannot be credited when juxtaposed with their videotaped statements, their guilty pleas, Alston's admissions to other witnesses, Alston's trial testimony and Bennett's grand jury and trial testimony. Both witnesses

> were extensively cross examined at trial by ten seasoned defense counsel over the course of several days about the many discrepancies and inconsistencies in their respective versions of events. It is exceedingly unlikely that any juror would have concluded that Alston and Bennett were not on the scene or that they were not accurately reporting at least most of what they saw, heard, and did that day. Their motives for now coming forward cannot be known. Both are now out of prison and no longer seeking release from the parole board, where their current lack of remorse might be held against them. Back in their communities, perhaps even this many years later they are still burdened with guilt from having benefitted themselves by sending their friends to prison. Whatever their current motivation may be, the court does not credit their recantations, and their attempt at exculpation does not help the petitioners meet their burden of proving actual innocence.

In short, the judge evaluated the recantations of Alston and Bennett in light of the entire evidentiary record, taking into account their demeanor both on the witness stand and during their allegedly coerced confessions, and weighing their recantations against their previous sworn

testimony and other evidence of their guilt and petitioners' guilt.[96] We have no basis on which to overturn the judge's finding that the recantations were incredible.

We also perceive no error in the judge's finding that the purported recantations of Montgomery and Jacobs were worthless. We need not belabor this point. As to Jacobs, the judge fairly concluded that her recantation was unreliable because it "did not indicate with any specificity or clarity just which parts of her prior account were untrue."[97] As for Montgomery, who disavowed his recanting affidavit and reaffirmed the truth of his trial testimony, the judge certainly did not err in concluding that his testimony at the 2012 hearing lent no support to petitioners' IPA claim.

Without the discredited recantations, appellants' remaining new evidence was clearly not enough to overcome the government's proof of their guilt and show their actual innocence by a preponderance of the evidence, let alone by clear and convincing evidence. Appellants argued that

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[96] It should be noted that the judge credited the detectives and prosecutors who denied having coerced witness testimony. In that connection, the judge did not ignore the expert opinion testimony of Dr. Leo. But as the judge pointed out, the most this expert testimony could show was that the interrogators in this case employed techniques that heightened the risk of a false confession; it did not establish that the confessions were false.

[97] *Meade*, 48 A.3d at 767. In addition to insisting that she lied about the petitioners at trial but did not remember anything she said, Jacobs also testified that she never went into the alley where Fuller was attacked. The judge found it striking, however, that "whenever [Jacobs] was asked if she saw any of the attack or the act of sodomy against Mrs. Fuller, Ms. Jacobs broke down sobbing just the way she did when she was confronted with that visual image at trial."

the "unrebutted scientific evidence," i.e., the expert opinion testimony of Dr. Callery and McCann, showed them to be innocent. We agree with the motions judge that this does not qualify as "new evidence" under the IPA, because appellants, in the exercise of reasonable diligence, could have presented such testimony at their trial.[98] But even assuming otherwise, the motions judge had ample reason to discount the expert testimony proffered by appellants, for as he explained,

> neither Dr. Callery nor Mr. McCann could definitively state that Mrs. Fuller was attacked by one to three individuals as opposed to a larger group. While both testified that, in their opinion, it was more likely that a small number of individuals inflicted the injuries on Mrs. Fuller, both admitted that it was possible that a greater number of persons were involved.[99] Given the court's rejection of the recantations and the other trial evidence pointing to an attack by ten or more assailants, petitioners' "unrebutted scientific evidence," even if it were new, is not particularly persuasive and does not begin to demonstrate that the petitioners are "actually innocent."

Finally, McMillan's horrific murder of A.M. in 1992 may tend to make it more likely that he was involved in

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[98] *See* D.C. Code § 22–4131(7); *Bouknight v. United States*, 867 A.2d 245, 254–56 (D.C. 2005).

[99] Moreover, the medical examiner who testified in 1985 concluded that he could not say with specificity how many people attacked Fuller, a conclusion with which Dr. Callery agreed.

the attack on Fuller eight years earlier. Nevertheless, we agree with the motions judge that "these two brutal murders could not be characterized as signature crimes," and that "[w]hatever may be said of the similarities between the two crimes, they certainly do not prove that James McMillan murdered Mrs. Fuller to the exclusion of [appellants], when all of the credible evidence points the other way."

V. Yarborough's Claim of Ineffective Assistance of Counsel

In the videotaped statement he gave following his arrest, appellant Yarborough admitted having been present at the alley and witnessing appellants' attack against Fuller, though he denied participating in the attack himself. Yarborough's motion to suppress the videotaped statement as involuntary was denied, and the statement was introduced in evidence against him at trial. In his §23–110 motion, Yarborough claimed that his trial counsel pursued suppression of his statement ineffectively, in violation of his duties to Yarborough under the Sixth Amendment, because he neglected to investigate Yarborough's mental disabilities and rely on them as additional grounds for finding the statement involuntary. In rejecting this claim, the motions judge concluded that Yarborough failed to show either that his counsel's performance was deficient or that the alleged deficiency prejudiced him at trial. We find it unnecessary to reach the question of deficient performance, because we agree with the motions judge that Yarborough has not carried his burden of showing the requisite likelihood of prejudice.

A. Background

1. Yarborough's Statements to Police

On October 4, 1984, three days after Fuller's murder, Yarborough was interviewed as a witness to the incident by Detectives McGinnis and Sanchez. Their questions and Yarborough's answers were recorded in an eight-page typewritten statement.[100] In this initial interview, Yarborough told the detectives he was present at 8th and H Streets when a number of his friends (including several of the appellants here) decided to rob a lady crossing the street there. Yarborough said he did not join them or participate in the attack, but he watched the others follow the lady to the alley. He said he walked away after hearing the lady's screams.

Yarborough was not arrested until the morning of December 9, 1984. On that occasion, he again waived his *Miranda* rights and agreed to be questioned by Detectives McGinnis and Sanchez. His interrogation culminated in an hour-long videotaped statement. At the outset of that statement, Yarborough confirmed that he understood and had waived his Fifth Amendment rights in writing, that

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[100] At the outset, Yarborough acknowledged understanding that he was not under arrest and was free to leave at any time, and he waived his *Miranda* rights. When asked whether he could read and write, Yarborough answered, "I can write but I can't read real good." Yarborough then was asked whether he would like Detective Sanchez to read his statement over to him, and he requested this be done. Yarborough proceeded to sign every page of the statement and initial every one of his answers.

no promises had been made to him in return for his statement, and that no force had been used against him.[101] Then, beginning with McGinnis's open-ended request to "tell us everything you know about" the death of Fuller, Yarborough described how he saw appellants and others attack, rob, hit, and stomp Fuller in the alley at 8th and H Streets, sodomize her with a pole just outside the garage, and then drag her into the garage there. Although Yarborough continued to deny having participated in this attack in any way (which was contrary to other evidence the police had obtained since his earlier interview), he now admitted his presence at the scene from start to finish. A version of Yarborough's videotaped statement, redacted to eliminate his identification of several of his co-defendants, was admitted in evidence against him at trial and played for the jury.

2. Yarborough's Suppression Motion

Prior to trial, Yarborough moved to suppress his videotaped statement. His sole contention at the suppression hearing was that the detectives had employed threats and physical abuse to coerce him into waiving his rights and admitting he was present when Fuller was murdered. The detectives denied it. Yarborough's only evidence of mistreatment—he did not take the stand and testify to it—was the fact that, after his statement was videotaped, the police took him to the hospital, where he was treated for pain and swelling in his left knee and released. The hospital records reflected that Yarborough reported his leg had been injured in the course of his arrest. In his videotaped

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[101] McGinnis asked Yarborough if he was injured. Yarborough said, "not really," and went on to explain that he had a "bad leg" from an injury he had received before that day.

statement, however, Yarborough said he had hurt his leg sometime before he was arrested, and Detective McGinnis testified that Yarborough told him he had injured his knee playing sports. After taking this evidence and viewing the videotape, the trial judge found that Yarborough did not sustain his knee injury during his interrogation, that his claims of abuse were unsubstantiated, and that he voluntarily waived his *Miranda* rights.

On direct appeal, Yarborough argued that the trial judge erred in denying his motion without taking into consideration "his age, education, and experience with the criminal justice system."[102] Because Yarborough had presented no evidence with respect to those factors, we held that the trial court "properly based its decision upon the important factors brought to its attention," and that "[u]nder the totality of the circumstances, the trial court's conclusion had substantial support in the evidence."[103] We affirmed the denial of Yarborough's motion to suppress.

3. The Hearing on Yarborough's Ineffective Assistance Claim

Yarborough took the stand for the first time at the 2012 hearing on appellants' post-conviction motions. He did so in part to present evidence relevant to his ineffective assistance of counsel claim (namely, that he took special education classes in junior high and high school and could not read well), but principally to assert his innocence and reiterate, this time in his own words, his previous claim that the detectives coerced him by means of physical violence and threats of violence into waiving his

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[102] *Catlett v. United States*, 545 A.2d 1202, 1207 (D.C. 1988).

[103] *Id.* at 1209.

rights and falsely incriminating himself. Contradicting the statements he gave to the police on October 4 and December 9, 1984 (and other evidence adduced at trial), Yarborough asserted that he spent the afternoon and evening of October 1, 1984, at his girlfriend's house, was not at 8th and H Streets when Fuller was attacked, and did not witness the crime at all.[104]

Yarborough claimed that the eight-page question-and-answer statement of October 4 was a total sham: The police, he said, wrote it in advance of his interview without his knowledge, and Detective McGinnis directed him to initial virtually every line and sign every page while covering it with his hand to prevent Yarborough from reading it.

As to the December 9 videotaped statement, Yarborough claimed it was the product of extensive physical abuse by Detective Sanchez, threats of violence by both detectives, and prolonged coaching by McGinnis. Yarborough testified that before the videotaping, in response to his initial refusal to waive his *Miranda* rights, Sanchez threw him across the table, screamed that he could not write "no" on the waiver form, and then slammed him back into his chair. Only then, Yarborough said, did he agree to waive his rights. Next, Yarborough testified, after he insisted he knew nothing about Fuller's murder, Sanchez threw him around the room and into a filing cabinet (allegedly injuring his left knee), dragged him to a bathroom and flushed his by now bloodied head in the toilet bowl. At one point, the detective dramatically ripped

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[104] Yarborough's girlfriend at the time, Chandera Hill, corroborated his alibi but was impeached with her 1985 grand jury testimony that she did not remember what she or Yarborough were doing on the day of the murder.

off his own t-shirt and threatened to kill Yarborough if he did not confess. McGinnis allegedly warned Yarborough that Sanchez had killed two other people for lying, expressed the hope that Yarborough would not be the third, and read him several statements about the attack on Fuller to instruct him what he needed to say. During the videotaping that followed this abusive treatment, Yarborough testified, Sanchez menacingly held a slapjack in his hand to keep him in line while McGinnis signaled to him with his eyes to guide his testimony and help him avoid straying from the script. (The videotape does not reveal any such behavior on the part of either detective, or any signs that Yarborough had been mistreated or injured.)

What he said on tape about the crime, Yarborough testified, came in part from what McGinnis told him to say (off-camera, just before the videotaping commenced), and in part from his own imagination. Because he did not admit to having participated in the robbery and assault of Fuller, Yarborough expected to be released after the videotaping.[105]

Both detectives testified at the hearing and contradicted Yarborough's account of his interrogations. They denied ever physically abusing Yarborough or threatening him in any way, telling him he could not invoke his rights, feeding him information, or directing him what to say or sign. The detectives averred that Yarborough himself provided the information in his eight-page statement on October 4; McGinnis described Yarborough as being

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[105] He remained in custody, however, and was taken to the hospital for his leg injury. He testified that he told hospital personnel that the police had beaten him.

able to understand and answer their questions in a responsive, "cogent" manner. The detectives acknowledged that on December 9, when they questioned Yarborough after he waived his rights and before he agreed to give a videotaped statement, they sometimes yelled at him, accused him of lying, and told him he would be better off if he would just tell the truth. They admitted playing a "good cop/bad cop" routine in which Sanchez pretended to be enraged, McGinnis ushered him out of the room, and Sanchez then banged on the door, demanding to be let back in. At one point, Sanchez either pretended to or actually did tear off his t-shirt for dramatic effect. But Yarborough did not appear to be intimidated by these tactics. He continued to deny any personal involvement in the attack on Fuller, and he adhered to certain details of his story that the detectives questioned (notably, whether he received money taken from Fuller, which Yarborough firmly denied).

Two witnesses at the 2012 hearing testified in support of Yarborough's claim that an investigation by his trial counsel of his cognitive impairments would have yielded support for a motion to suppress his videotaped statement on voluntariness grounds. First, Dr. Michael O'Connell, a forensic psychologist, testified that Yarborough had an adjusted full scale I.Q. score of 69.5, placing him at the high end of the range for mild mental retardation, and that Yarborough's low scores on the Gudjonsson Suggestibility Scales indicated he was more suggestible than 99%

of the population.[106] Dr. O'Connell opined that a person with these characteristics would struggle in an interrogation setting because he would tend to overemphasize short-term benefits at the expense of long-term consequences and be acquiescent and eager to please his interrogators.[107]

Second, Chandera Hill (Yarborough's girlfriend in 1984) testified that she regularly helped Yarborough with his homework, often doing it for him because he had trouble with reading, comprehension, and pronunciation.[108] She also testified that Yarborough's trial counsel spoke to her but never asked her about Yarborough's I.Q., comprehension, reading, or homework abilities.

In rejecting Yarborough's ineffective assistance claim, and concluding that evidence of his mental impairments would not have changed the outcome of the motion to suppress his videotaped statement, the motions judge found, inter alia, that Yarborough's testimony at the hearing was "patently incredible," and that the evidence did not "bear out any of [his] extraordinary claims" of physical abuse, threats, and other misconduct by the detectives who obtained his statements.[109] The judge credited the detectives' testimony to the contrary. In addition, and "most importantly," the judge found that

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[106] There also was documentary evidence, referenced in Yarborough's presentencing report, that a psychological evaluation performed in May 1984 found Yarborough to be "functioning intellectually in the mentally deficient to borderline range."

[107] Yarborough "didn't do badly," however, on a test to determine whether he understood his *Miranda* rights.

[108] Yarborough was sixteen years old in 1984.

[109] Yarborough does not challenge these factual findings on appeal.

[Yarborough's] demeanor on the videotape of his interrogation shows him to be entirely relaxed, spontaneous, and in no distress. Many of the things Yarborough said on the videotape seem unlikely when compared with other evidence, but there is no indication that the facts he chose to include came from the police or from any source other than him. For example, when the detectives tried to get him to admit that he received money that was part of the proceeds of the robbery of Mrs. Fuller, he adamantly insisted that the two dollars he received from petitioner Catlett was a loan that came from other money Catlett had in his pocket, not from the proceeds of the robbery.

In sum, the judge found that Yarborough's videotaped statement

> was not the statement of a helpless mentally vulnerable young man being fed facts by the police and parroting them back to please his interrogators; it was the voluntary admission of a conniving youthful offender trying to distance himself as far as possible from the crime while not denying that he was there . . . . No amount of psychological testing or social science research was likely to convince the court that this false exculpatory statement should be suppressed, particularly where the judge did not believe the defendant's claim about physical coercion in the first place.

B. Analysis

A claim of ineffective assistance of counsel has two components:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.[110]

The performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact.[111] On appeal, we accept the motions judge's findings of fact unless they lack evidentiary support, and we review the judge's legal conclusions *de novo*.[112]

As the Supreme Court has said, "there is no reason" for an appellate court to address both components of the ineffectiveness inquiry if it determines that the defendant has made an insufficient showing on one of them. "In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies . . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which

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[110] *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

[111] *Id.* at 698.

[112] *Cosio v. United States*, 927 A.2d 1106, 1123 (D.C. 2007) (en banc).

we expect will often be so, that course should be followed."[113] We think it appropriate to confine our discussion here to the prejudice component of Yarborough's claim. We therefore shall assume, without deciding, that trial counsel performed deficiently in failing to investigate and learn of Yarborough's mental limitations in anticipation of moving to suppress his videotaped statement as involuntary.[114] The question then is whether it is likely that this failure of investigation was prejudicial to Yarborough.

To satisfy the prejudice component of the ineffectiveness inquiry, a defendant's burden is to show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[115] In this case, that necessary showing has multiple steps. First, Yarborough must show a reasonable probability that a competent attorney, having investigated and become aware of his intellectual limitations and susceptibility to police pressure and suggestion, would have relied on those facts as a basis for moving to suppress his videotaped statement as involuntary.[116] Second, Yarborough must show that it is reasonably probable the trial court would have granted a motion to suppress based on this

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[113] *Strickland*, 466 U.S. at 697.

[114] It should be noted that Yarborough's claim is that his statement was involuntary, not that he lacked the necessary understanding to waive his Fifth Amendment rights knowingly and intelligently.

[115] *Strickland*, 466 U.S. at 694.

[116] *See Cosio*, 927 A.2d at 1132.

theory.[117] And third, Yarborough also must show a reasonable probability that the jury's verdict would have been different—that the jury would have acquitted him on at least some counts—had his statement been suppressed.[118] We shall focus on the first two of these steps.[119]

At the pretrial suppression hearing, the government bore the burden of proving that Yarborough's videotaped statement was voluntary by a preponderance of the evidence.[120] "The test for determining the voluntariness of specific statements is whether, under the totality of the circumstances, the will of the suspect was overborne in

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[117] *Howerton v. United States*, 964 A.2d 1282, 1290 (D.C. 2009) (citing *Taylor v. United States*, 603 A.2d 451, 459 (D.C. 1992)).

[118] See *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986) (holding that where a claim of ineffectiveness is predicated on defense counsel's failure to litigate an evidence suppression motion competently, the defendant must prove that the motion "is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice").

[119] We think Yarborough has made the showing required in the third step, a reasonable probability that the jury would have acquitted him had it not had his videotaped statement to consider. The evidence introduced at trial of Yarborough's complicity in the attack on Fuller without that statement was not overwhelming. Although Alston and Thomas implicated him in the attack, Bennett testified that Yarborough remained in the park when the group accosted Mrs. Fuller, and Montgomery only remembered seeing Yarborough there after the murder, not before. The importance of Yarborough's videotaped statement is suggested by the fact that it was the last thing the jury asked to see before returning its first round of verdicts, in which it found Yarborough guilty.

[120] *Graham v. United States*, 950 A.2d 717, 735 (D.C. 2008) (citing, *inter alia*, *Lego v. Twomey*, 404 U.S. 477, 484 (1972)).

such a way as to render his confession the product of coercion."[121] The presence of official compulsion—"coercive police activity" or "police overreaching"—is "a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause."[122] That said, "[i]n determining whether a defendant's will was over-borne in a particular case, the Court has assessed the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation."[123] Relevant personal characteristics include "the suspect's age, education, prior experience with the law, and physical and mental condition"; "relevant details of the interrogation include its duration and intensity, the use of physical punishment, threats or trickery, and whether the suspect was advised of his rights."[124]

Because Yarborough's intellectual limitations and suggestibility could have impaired his effective assertion

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[121] *Id.* at 735–36 (internal quotation marks and brackets omitted).

[122] *Id.* at 736 (quoting *Colorado v. Connelly*, 479 U.S. 157, 166–67 (1986)).

[123] *Id.* at 736 (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)).

[124] *Id.*; *see also, e.g., In re M.A.C.*, 761 A.2d 32, 36 (D.C. 2000) (recognizing that where "young persons" are involved, the factors bearing on voluntariness include "the juvenile's age, experience, education, background and intelligence, the circumstances under which the statement was given, and whether the juvenile 'has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights,' " as well as any "evidence of physical abuse, the length of the detention, the use of trickery, mental or emotional stability, mental capacity, and physical illness or injury") (quoting *Fare v. Michael C.*, 442 U.S. 707, 725 (1979)).

of his rights and rendered him vulnerable to police coercion, they unquestionably were relevant to the voluntariness inquiry in this case. But that is not the end of the inquiry[125]; despite Yarborough's cognitive weaknesses, there is insufficient evidence to show a reasonable probability that he actually was coerced into waiving his rights and providing the statement used against him. The evidence is to the contrary.

First, the contention that Yarborough's videotaped statement was the product of his intellectual limitations and consequent vulnerability to police suggestion is flatly inconsistent with Yarborough's own testimony at the 2012 hearing and what he apparently told his trial counsel in 1985—that the detectives coerced him into waiving his rights and making a false statement against his will by force and violence. This assertion by Yarborough means that his putative vulnerability to police suggestion had nothing to do with his waiver and statement. Indeed, so far as appears, Yarborough has never maintained that his statement and incriminating admissions were the product of undue suggestion or trickery by his interrogators, or of his own suggestibility, confusion, naïve desire to please the police, inability to appreciate the gravity of his situation, or the like. As the motions judge observed in his decision, Yarborough claimed "the police beat the statement out of him under circumstances that would have caused

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[125] *Cf. In re M.A.C.*, 761 A.2d at 38–39 (upholding determination that mildly mentally retarded fifteen-year-old's confession was voluntary; "[a] low I.Q., standing alone, will not render an otherwise voluntary and knowing confession inadmissible . . . . [t]he youth's intelligence, as measured by testing, is only one of many factors for consideration"); *Robinson v. United States*, 928 A.2d 717, 725–27 (D.C. 2007) (holding videotaped confession voluntary notwithstanding defendant's mild mental retardation).

the strong as well as the weak to succumb to the pressure." This is devastating to Yarborough's alternative claim that his intellectual limitations could have persuaded the trial court to suppress his statement as involuntary, since it means the argument would have been vitiated and frustrated by Yarborough's inability to support it with his own testimony.

In addition, the other evidence in its totality refutes the claim that the detectives took advantage of Yarborough's low intelligence and suggestibility to coerce his videotaped statement. That hour-long exchange with the detectives is itself compelling evidence otherwise. Whatever pressure Yarborough was under to confess his participation in the attack on Fuller, he did not yield to it.[126] Nor was he notably compliant in other respects. As the motions judge pointed out, Yarborough did not acquiesce in the detectives' effort to get him to admit that he received some of Fuller's money from appellant Catlett after the murder. That a number of other details Yarborough provided about the assault were contrary to what the police had learned from other sources further undercuts the claim that Yarborough was induced to spout what the detectives wanted to hear even though he did not know it to be true. In point of fact, Yarborough's serious cognitive limitations themselves make it hard to credit the idea that his videotaped statement was the product of a rehearsal in which he learned the lines the detectives fed him; one would think the degree of concentration and

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[126] Indeed, that Yarborough professes to have believed he was going to be released after the videotaping because he had not admitted participating in the attack provides additional reason to conclude his statement was voluntary.

memory required for that to succeed would have been beyond his mental capabilities.

There is no indication of coercion or lack of voluntariness on the videotape. It can be seen that Yarborough is not handcuffed. He sits at a table, facing the two detectives. He has a can of soda to drink. The motions judge accurately described his demeanor as relaxed, spontaneous, and evincing no sign of distress or discomfort. Yarborough does not appear to be injured or tired. He was not deprived of sleep, nor had he been in custody for more than a few hours. He had been advised, repeatedly, of his *Miranda* rights, and he had agreed to waive them. There is no reason to doubt that he adequately understood his rights and what it meant to waive them.

In short, due to his intellectual limitations, Yarborough may have been highly suggestible, compliant, and prone to making faulty judgments about his own best interests—but that does not mean the police obtained his videotaped statement by taking advantage of those vulnerabilities. The evidence to the contrary convinces us that there is no reasonable probability that a motion to suppress his statement as involuntary based on his intellectual limitations would have succeeded, or that competent counsel aware of Yarborough's mental disabilities would have thought such a motion worth pursuing under the circumstances of this case. We therefore hold that Yarborough has not shown the necessary prejudice from his trial counsel's failure to investigate his mental limitations to prevail on his claim of ineffective assistance of counsel.

VI. Conclusion

For the foregoing reasons, we affirm the order of the Superior Court denying appellants' motions for relief from their convictions under D.C. Code §§ 22–4135 and 23–110.

So ordered.

APPENDIX B

DISTRICT OF COLUMBIA COURT OF APPEALS

Nos. 12-CO-1362, 12-CO-1538, 12-CO-1539, 12-CO-1540, 12-CO-1541, 12-CO-1542, & 12-CO-1543

CHARLES S. TURNER, CHRISTOPHER D. TURNER, RUSSELL L. OVERTON, LEVY ROUSE, CLIFTON E. YARBOROUGH, KELVIN D. SMITH, & TIMOTHY CATLETT, Appellants

v.

UNITED STATES, Appellee.

January 14, 2016

BEFORE: WASHINGTON, Chief Judge; GLICKMAN*, BLACKBURNE-RIGSBY*, THOMPSON, and EASTERLY, Associate Judges; NEBEKER*, Senior Judge.

ORDER

On consideration of appellants Clifton Yarborough, Kelvin Smith, Levy Rouse, Charles Turner, Christopher Turner, and Timothy Catlett's petition for rehearing or rehearing en banc, appellant Russell L. Overton's petition for rehearing or rehearing en banc, appellant Christopher

Turner's joinder of Russell L. Overton's petition for rehearing or rehearing *en banc*, and appellee's response thereto, it is

ORDERED by the merits division* that appellants Clifton Yarborough, Kelvin Smith, Levy Rouse, Charles Turner, Christopher Turner, and Timothy Catlett's petition for rehearing is denied; and it appearing that no judge of this court has called for a vote on appellants' petition for rehearing *en banc*, it is

FURTHER ORDERED by the merits division* that appellants Russell Overton and Christopher Turner's petition for rehearing is denied; and it appearing that no judge of this court has called for a vote on appellants' petition for rehearing *en banc*, it is

FURTHER ORDERED that appellants Clifton Yarborough, Kelvin Smith, Levy Rouse, Charles Turner, Christopher Turner, and Timothy Catlett's petition for rehearing *en banc* is denied. It is

FURTHER ORDERED that appellants Russell Overton and Christopher Turner's petition for rehearing *en banc* is denied.

PER CURIAM

Associate Judges Fisher, Beckwith and McLeese did not participate in these appeals.

APPENDIX C

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA CRIMINAL DIVISION

Nos. 8617-FEL-84, 8613-FEL-84, 8614-FEL-84, 8616-FEL-84, 8513-FEL-84, 8612-FEL-84, 8615-FEL-84

TIMOTHY CATLETT, RUSSELL OVERTON, LEVY ROUSE, KELVIN SMITH, CHARLES TURNER, CHRISTOPHER TURNER, CLIFTON YARBOROUGH, Petitioners

v.

UNITED STATES, Respondent.

August 6, 2012

INTRODUCTION

WEISBERG, Associate Judge.

On October 1, 1984, at approximately six in the evening, the lifeless body of Catherine Fuller, a forty-eight year old mother of six, was found in a filthy garage in an alley that ran behind the north side of the 800 block of H Street, N.E. Mrs. Fuller had been beaten to death. Her bones were broken, her liver was shattered, and she had been brutally sodomized by a hard object that had been shoved approximately a foot into her rectum, tearing tissues and organs in its path. On December 16 and 18, 1985,

a jury found these seven petitioners guilty of first degree felony murder for their roles in the robbery and killing of Mrs. Fuller. Petitioners appealed, raising numerous issues.[1] The Court of Appeals affirmed all convictions. *Catlett v. United States*, 545 A.2d 1202 (D.C. 1988).[2] Acknowledging conflicts in the testimony, the appellate court characterized the government's evidence as "overwhelming." *Id.* at 1206 n.2.

The government's evidence at trial relied heavily on two cooperating witnesses, who had pled guilty to reduced charges in return for their testimony, and several other eyewitnesses, many of whom had various motives to testify falsely and had made numerous inconsistent statements, which left considerable room for impeachment and extensive cross examination by the ten skilled defense attorneys. Ultimately, the jury believed the prosecution's

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[1] For reasons not clear from the record, petitioner Charles Turner did not appeal.

[2] The jury convicted defendants of first degree felony murder (kidnapping while armed), first degree felony murder (armed robbery), kidnapping, and armed robbery. The Court of Appeals held that the defendants could not be sentenced for both felony murder and the predicate felony, or for more than one felony murder for the killing of a single victim. *Catlett v. United States*, 545 A.2d 1202, 1219 (D.C. 1988). On remand, Judge Robert Scott vacated the convictions of first degree felony murder (kidnapping while armed) and armed robbery and resentenced all petitioners except Christopher Turner to consecutive prison terms of twenty years to life and fifteen years to life on their remaining convictions of felony murder (armed robbery) and kidnapping. Mr. Turner was sentenced to concurrent terms of twenty years to life and seven and a half years to life and he is currently on parole.

witnesses, convicting eight of the ten defendants and acquitting two.[3]

More than twenty-five years later, the seven petitioners are back before the court pursuant to the Innocence Protection Act, D. C. Code § 22-4135, asserting a claim that they are actually innocent of all crimes relating to the murder of Catherine Fuller. In addition, petitioners contend that the government withheld from the defendants at trial numerous items that were favorable to them and material to guilt, in violation of their due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. Finally, petitioner Yarborough alone moves to vacate his conviction on the ground that he was denied effective assistance of counsel because his trial attorney did not present evidence at his motion to suppress statements

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[3] The government originally charged seventeen people in the murder of Catherine Fuller: Calvin Alston, Harry Derrick Bennett, Lamont Bobbitt, James Campbell, Timothy Catlett, Roland Franklin, Alphonso Harris, Darryl Murchison, Russell Overton, Levy Rouse, Felicia Ruffin, Kelvin Smith, Charles Turner, Christopher Turner, Steven Webb, Gregory Williams, and Clifton Yarborough. The jury convicted Catlett, Overton, Rouse, Smith, Charles Turner, Christopher Turner, Webb, and Yarborough of kidnapping, armed robbery, and two counts of first degree (felony) murder. Ruffin and Harris were acquitted. Campbell's case was severed when his attorney became ill during voir dire, and he eventually pleaded guilty to manslaughter and attempted robbery in May 1986. Alston and Bennett cooperated with the government, pleaded guilty to second degree murder (Alston) and manslaughter and robbery (Bennett), and testified at trial. Franklin, Murchison, Bobbitt, and Williams were not indicted, and the government ultimately dismissed the charges against them. Steven Webb died in prison. The other seven convicted defendants are the petitioners before the court. Christopher Turner is the only petitioner who is no longer in prison.

or at trial to show that Yarborough's low intellectual functioning and poor education allowed police to manipulate him into giving involuntary and false incriminating statements.[4]

In recent years, particularly since the advent of forensic use of DNA, tragic cases of wrongful convictions of innocent persons have been uncovered. This case is not one of them. Petitioners have no DNA or other scientific evidence exonerating them.[5] What they have are witnesses

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[4] Petitioner Christopher Turner filed his first motion to vacate his conviction or in the alternative for a new trial on January 6, 2010, and filed an amended motion on April 6, 2010. The other petitioners joined his amended motion in early 2011. Petitioner Yarborough filed his own amended motion to vacate on February 3, 2012, which included a claim for relief pursuant to D.C. Code § 23-110 based on ineffective assistance of counsel. The court held an evidentiary hearing from April 23 to May 15, 2012, at which it took testimony relating to all of petitioners' claims.

[5] Unlike the recent highly publicized exonerations of Donald Gates, Santae Tribble, and Kirk Odom, petitioners do not claim that the government relied on flawed or discredited forensic evidence to obtain their convictions. Gates was convicted of rape and murder in 1982 based in part on now-discredited hair sample analysis. He was exonerated in 2009 when DNA tests conclusively excluded him as the source of the semen found on the victim's body. Tribble was convicted of armed robbery and first degree murder in 1980. At his trial, an FBI hair expert testified that a hair found in a stocking mask at the scene came from Tribble or from an individual of the same race whose hair had the same characteristics as Tribble's. The government also introduced ballistics evidence tying Tribble to the scene and testimony from two witnesses who claimed that he confessed to them. His conviction was vacated in May 2012 after the government conceded that DNA from the hair did not match Mr. Tribble. Because the government was "not in a position — 34 years after the murder was committed — to develop additional evidence that could be used at trial," the

who testified against them at their trial in 1985 — including two accomplices who pled guilty and were sentenced to lengthy prison terms — who now claim that their testimony was false, that it was based entirely on news reports, rumors, and facts that were fed to them by police and prosecutors, and that the police used threats and other coercive interrogation techniques to force them to tell lies against themselves and these petitioners.

These recantations, including petitioner Yarborough's hearing testimony denying any involvement in the crime, are at the heart of all of petitioners' claims. Unless the court credits the recantations, petitioners cannot meet their burden of showing that they are actually innocent, they cannot demonstrate that any of the information that was not disclosed to them at the time of their trial meets the test for "materiality" under *Brady v. Maryland*, and

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government agreed that the court should vacate defendant's conviction with prejudice. Gov. Resp. to Def. Mot. to Vacate Conviction, *United States v. Santae Tribble*, 1978-FEL-004160, Apr. 27, 2012, at 2. Similarly, Odom was convicted of a 1981 rape based in part on the same type of flawed and overstated expert testimony based on microscopic hair analysis. He was exonerated in July 2012 after DNA testing showed that the hair left by the rapist on the victim's clothing could not have come from Odom and the semen recovered from the victim actually matched the DNA of another convicted sex offender. By contrast, in petitioners' trial, the government did not introduce forensic evidence and instead relied primarily on eyewitness testimony and on the medical examiner's autopsy findings. On May 25, 2011, the court ordered DNA testing on oral, vaginal and rectal swabs taken from Mrs. Fuller's body; hairs recovered from Mrs. Fuller's body; a semen sample from Mrs. Fuller's pantyhose; a metal pole found at the scene; and various articles of Mrs. Fuller's clothing. Petitioners' counsel represented at the March 9, 2012, status hearing that none of the items contained enough biological material to enable the laboratory to derive a DNA profile from them.

petitioner Yarborough cannot show that he was prejudiced by any negligence of his lawyer in the litigation of his motion to suppress. For the reasons that follow, the court rejects each of petitioners' claims.

I. Petitioner Yarborough's Ineffective Assistance Claim

Petitioner Yarborough gave two inculpatory statements to the police: a typewritten statement on October 4, 1984, and a videotaped statement on December 9, 1984. His trial attorney moved to suppress both statements, arguing that they were involuntary and taken in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). The trial judge denied the motion, and a redacted version of the December 9 statement was introduced against Yarborough at trial.[6] On appeal, the District of Columbia Court of Appeals affirmed the trial judge's denial of the motion to suppress, pointing out that Yarborough "presented no evidence regarding either his educational level or juvenile record." *Catlett*, 545 A.2d at 1209. Petitioner Yarborough now claims that his lawyer's failure to introduce that type of evidence in support of his motion to suppress and at trial constituted ineffective assistance of counsel.

The theory of defendant Yarborough's motion to suppress was that the police had literally beaten the December 9 statement out of him until he eventually admitted

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[6] Yarborough did not testify at trial. His statement implicated several of his codefendants, including Overton, Harris, Charles and Christopher Turner, Catlett, and Rouse. The court ordered that all references to the codefendants be redacted to comply with *Bruton v. United States*, 391 U.S. 123 (1969). The redacted statement was introduced with instructions that the jury could consider it only as to defendant Yarborough.

that he was present when Mrs. Fuller was murdered. The trial judge heard the evidence and rejected it. For instance, the trial judge specifically found that the knee injury Yarborough claimed to have suffered when the police roughed him up during the interrogation did not occur during the interrogation. The judge generally credited the testimony of the prosecution witnesses at the hearing on the motion. The Court of Appeals affirmed the trial judge's ruling. Petitioner Yarborough still maintains that he was physically beaten and abused by the interrogating detectives; but that claim was fully litigated and decided against him, and it cannot be re-litigated on collateral attack. *See Doepel v. United States*, 510 A.2d 1044, 1045-46 (D.C. 1986). In his current motion he contends that his lawyer was constitutionally ineffective by failing to develop and introduce evidence that Yarborough was too feebleminded to resist the coercive interrogation tactics of the police and simply repeated what they told him to say about the crime, all of which he asserts was false.

A. Yarborough's ineffective assistance claim is procedurally barred as a successive motion and an abuse of the writ.

On April 28, 1995, Yarborough filed a *pro se* motion pursuant to D.C. Code § 23-110, alleging ineffective assistance of counsel based on, *inter alia*, his lawyer's incompetent presentation of the motion to suppress his videotaped statement. That claim had not been raised when the case was on direct appeal, but it was not procedurally defaulted because *Shepard v. United States*, 533 A.2d 1278 (D.C. 1987), had not yet been decided at the time of Yarborough filed his direct appeal and because Yarborough was represented on appeal by the same lawyer who represented him at trial. *See Little v. United States*,

748 A.2d 920, 923 (D.C. 2000); *Sullivan v. United States*, 721 A.2d 936, 937 (D.C. 1998). Yarborough's section 23-110 motion specifically argued that his lawyer failed to introduce any evidence to show that he was poorly educated and had no experience with the legal system, echoing what the Court of Appeals had noted in its opinion affirming the trial court's denial of his motion to suppress. Judge Brook Hedge denied the motion by written order on September 25, 1995, ruling that the alleged failures of defendant's trial attorney would not have had any effect on the outcome of the motion to suppress or on the outcome of the trial and therefore did not satisfy the prejudice standard of *Strickland v. Washington*, 466 U.S. 668, 687 (1984).[7] Yarborough did not appeal that ruling.

This is now Yarborough's second section 23-110 motion alleging ineffective assistance of counsel in connection with his lawyer's preparation and presentation of his motion to suppress. As such, it is a "successive motion" and it is procedurally barred, absent a showing of cause and prejudice. *See* D.C. Code § 23-110 (e); *Richardson v. United States*, 8 A.3d 1245, 1250 (D.C. 2010); *Bradley v. United States*, 881 A.2d 640, 645-46 (D.C. 2005) ("Without a showing of cause and prejudice, [a defendant] is entitled to no more than one bite at the ineffective assistance apple. [He], like any other convicted defendant, cannot keep presenting new claims of ineffective assistance of counsel,

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[7] Petitioner Yarborough argues, erroneously, that Judge Hedge denied his pro se motion on the ground that his allegations were "vague and conclusory" and that she did not reach the merits of his ineffective assistance claim. Petitioner's Proposed Findings of Fact and Conclusions of Law (hereinafter "Pet. Brief") at 159. To the contrary, Judge Hedge expressly ruled that Yarborough could not show prejudice under *Strickland* with respect to his allegations relating to the motion to suppress.

basing each new claim on different acts or omissions by counsel that were not mentioned in a previous motion."); *Washington v. United States*, 834 A.2d 899, 903-04 (D.C. 2003); *Matos v. United States*, 631 A.2d 28, 30 (D.C. 1993) (unless a defendant shows both cause for his failure to raise an available challenge earlier and prejudice as a result of that failure, "'abuse of writ' doctrine generally bars subsequent consideration of 'claims not raised, and thus defaulted, in the first [collateral] proceeding'" (quoting *McCleskey v. Zant*, 499 U.S. 467, 489 (1991))).

In an attempt to show "cause," Yarborough argues that he did not have a lawyer when he filed his first collateral attack and that he could not effectively litigate his *pro se* motion because of his low intelligence, citing *McClurkin v. United States*, 472 A.2d 1348, 1362 n.19 (D.C. 1984) and *Dantzler v. United States*, 696 A.2d 1349, 1350 n.3 (D.C. 1997). However, those cases do not hold that a petitioner who has already filed a *pro se* collateral attack can establish "cause" by obtaining a lawyer and filing another nearly identical claim. At most, *McClurkin* and *Dantzler* stand for the proposition that it was not error for the trial court to address the merits of the defendant's successive collateral attack when his earlier motion was *pro se*. Later decisions like *Bradley* and *Washington*, *supra*, suggest that *pro se* status will not excuse a procedurally defaulted claim on collateral attack, and several federal decisions have so held. *See, e.g., United States v. Roberson*, 194 F.3d 408, 415 n. 5 (3d Cir. 1999); *Whittemore v. United States*, 986 F.2d 575, 579 (1st Cir. 1993); *United States v. Flores*, 981 F.2d 231,236 (5th Cir. 1993).

Moreover, at least on federal habeas,[8] cause to excuse a procedural default or abuse of the writ must be based on some objective factor external to the defense, which prevented the petitioner from raising the issue. *Murray v. Carrier*, 477 U.S. 478, 488 (1986); *see also McCleskey*, 499 U.S. at 493. Such things as *pro se* status, ignorance of the court system, and low education level or intelligence will not suffice. *See Harris v. McAdory*, 334 F.3d 665, 668-69 (7th Cir. 2003), *cert. denied*, 541 U.S. 992 (2004); *Hull v.*

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[8] Several circuits have held that the *McCleskey* "cause and prejudice" standard for excusing an "abuse of the writ" applies to both state habeas petitions brought under 28 U.S.C. § 2254 and federal collateral attacks brought under 28 U.S.C. § 2255. *See, e.g., United States v. Flores*, 981 F.2d 231, 234-35 (5th Cir. 1993); *Andiarena v. United States*, 967 F.2d 715, 717 (1st Cir. 1992); see also *United States v. Palmer*, 353 U.S. App. D.C. 128, 137-38 and n. 10, 296 F.3d 1135, 1144-45 and n. 10 and 11 (2003) (successive section 2255 petitions filed after 1996 are governed by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (as codified at 28 U.S.C. §§ 2244(b) and 2255), which bars successive petitions unless authorized by order of the circuit court). D.C. Code § 23-110 is the functional equivalent of 28 U.S.C. 2255, and the jurisprudential rules governing motions brought under the two provisions are generally the same. *See Porter v. United States*, 37 A.3d 251, 269 (D.C. 2012) ("Where [a] D.C. statute, rule or the like, is substantially identical to a federal counterpart, [the D.C. Court of Appeals looks] to the federal counterpart as persuasive authority . . . . In construing D.C. Code § 23-110 [t[illegible]D.C. Court of Appeals relies] on federal jurisprudence construing [illegible]U.S.C. § 2255." (citing *United States v. Little*, 851 A.2d 1280, 1282 n [illegible](D.C. 2005))); *Williams v. United States*, 878 A.2d 477, 480 (D.C. 2005) ("Since the two statutes are nearly identical, 'and § 23-110 is the functional equivalent of the federal statute,' [the D.C. Court of Appeals] will look to federal cases interpreting § 2255 in interpreting § 23-110." (quoting *Snell v. United States*, 754 A.2d 289, 292 n.3 (D.C. 2000))). Moreover, several decisions have expressly applied the federal "abuse of the writ" principles to section 23-110 motions. *See Bradley v. United States*, 881 A.2d 640, 646 (D.C. 2005); *Washington v. United States*, 834 A.2d 899, 902-903 (D.C. 2003); *Matos v. United States*, 631 A.2d 28, 30 (D.C. 1993).

Freeman, 991 F.2d 86, 91 (3d Cir. 1993); *Flores*, 981 F.2d at 236; *Cornman v. Armontrout*, 959 F.2d 727, 729 (8th Cir. 1992); *Tacho v. Martinez*, 862 F.2d 1376, 1381 (9th Cir. 1988).

Ordinarily the court would decline to consider petitioner Yarborough's ineffective assistance claim as a successive motion under D.C. Code § 23-110 (e) and an abuse of the writ. However, because the question is not entirely free from doubt and because the court would entertain even a procedurally barred motion if it were necessary to prevent a fundamental miscarriage of justice, such as the conviction of an innocent person, the court will address the merits of the motion. *See McCleskey*, 499 U.S. at 494 (citing *Murray*, 477 U.S. at 485).

B. Yarborough was not denied effective assistance of counsel.

To succeed on a claim of ineffective assistance of counsel, a defendant must show that: (1) his counsel's performance was so deficient that it fell below an objective standard of reasonableness; and (2) the deficient performance was so prejudicial that, but for the errors of counsel, the result of the proceeding would probably have been different. *Long v. United States*, 36 A.3d 363, 373 (D.C. 2012) (citing *Strickland*, 466 U.S. at 687-88, 694).

In evaluating trial counsel's performance, the court should "strongly presume" that counsel "rendered adequate assistance and made all significant decisions in the exercise of professional judgment." *Cullen v. Pinholster*, 563 U.S. ____ ____, 131 S.Ct. 1388, 1403 (2011) (quoting *Strickland*, 466 U.S. at 690); *Long*, 36 A.3d at 373. The court may not second-guess the judgments and tactical decisions of counsel and order a new trial simply because

the court or another attorney, with hindsight, might have chosen a different course. *Strickland*, 466 U.S. at 690-91; *Leftridge v. United States*, 780 A.2d 266, 272 (D.C. 2001); *Curry v. United States*, 498 A.2d 534, 540 (D.C. 1985). Rather, trial counsel must be given "sufficient latitude to make tactical decisions and strategic judgments involving the exercise of professional abilities." *Woodward v. United States*, 738 A.2d 254, 257 (D.C. 1999) (citing *Strickland*, 466 U.S. at 689); *Ginyard v. United States*, 816 A.2d 21, 36 (D.C. 2003). "A reasonable tactical decision will not support a claim of ineffective assistance of counsel." *Wu v. United States*, 798 A.2d 1083, 1091 (D.C. 2002). Regarding an attorney's obligation to consult experts, "[a]n attorney can avoid activities that appear 'distractive from more important duties,'" and is "entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies." *Harrington v. Richter*, 562 U.S. _____, 131 S.Ct. 770, 789 (2011) (quoting *Bobby v. Van Hook*, *558* U.S. _____ 130 S.Ct. 13, 19 (2009) (*per curiam*)).

To establish prejudice under the second prong of *Strickland*, the defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Zanders v. United States*, 678 A.2d 556, 569 (D.C. 1996) (quoting *Strickland*, 466 U.S. at 694). "A reasonable probability is a probability sufficient to undermine confidence in the outcome," and requires "a 'substantial,' not just 'conceivable,' likelihood of a different result." *Cullen*, 131 S.Ct. at 1403 (quoting *Harrington*, 131 S.Ct. at 792). On a claim that counsel failed to file an appropriate motion to suppress evidence or, as in this case, filed a motion but failed to litigate it effectively, the defendant's burden to

prove prejudice under *Strickland* would require a showing that the motion, if properly litigated, would have been granted *and*, had the evidence been suppressed, it is probable that the outcome of the trial would have been different. *See Howerton v. United States*, 964 A.2d 1282, 1290 (D.C. 2009) ("[A]n attorney's failure to file a particular motion will not be regarded as ineffective assistance unless the motion, if filed, would in all likelihood have been granted." (quoting *Taylor v. United States*, 603 A.2d 451, 459 (D.C. 1992))); *Little v. United States*, 851 A.2d 1280, 1289 (D.C. 2004) (a petitioner must show a "reasonable probability that the trial's outcome would have been different had [the suppression] motion been timely filed"). Petitioner Yarborough has not shown either deficient performance or prejudice under the *Strickland* standard.

In support of his present claim, Yarborough offers the testimony of Dr. Michael O'Connell, Ph.D., and Dr. Richard Leo, Ph.D., J.D. The court accepted Dr. O'Connell as an expert in forensic psychology. He testified that he performed various tests on Mr. Yarborough and determined that Yarborough had an adjusted full scale IQ score of 69.5, which is at the high end of the scale for mild mental retardation.[9] Dr. O'Connell noted that Yarborough ranked in the bottom 1% of the population on the Gudjonsson suggestibility scale ("GSS"), meaning that he is more suggestible than 99% of the population, and he opined that low GSS scores have been linked to a propensity to give a false confession. According to Dr. O'Connell, petitioner's low intelligence likely prevented him from appreciating the long-term consequences of confessing to police, and

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[9] Dr. O'Connell testified that Yarborough's actual IQ score was 71, which would be considered borderline, but Dr. O'Connell adjusted it downward to account for the passage of time.

would have caused him to be highly suggestible to information allegedly provided by police and to misunderstand certain words and phrases used by police when they interrogated him. *See* Transcript of Post-Conviction Proceeding (hereinafter "Hearing Tr."), Apr. 24, at 267-390.

Over the government's objection, the court allowed Dr. Leo to testify as an expert in social psychology and criminology, with particular emphasis on police interrogation and false confessions. The gist of his testimony is as follows: A relatively small number of confessions have been proven to be false. Because some confessions have been proven false, there are presumably other false confessions, but it is not possible to know how many or which ones they are. The proven false confessions have certain common features, among which are harsh interrogation techniques, threats if the person does not confess or promises of leniency or other reward if the person does confess, and particularly susceptible or vulnerable persons, such as juveniles or persons who are mentally ill or mentally retarded. Therefore, according to Dr. Leo, when these factors are present, as they are in this case, there is a heightened risk of a false confession. Hearing Tr., May 1, at 1248-1369; May 2, at 1378-1533.

Of course, a heightened risk of a false confession is not the same as a likelihood that the confession is false. Indeed, as Dr. Leo himself conceded, since the vast majority of confessions are true, even when these same risk factors are present, it is much more likely that the confession is true. Moreover, even if one were to accept Dr. Leo's premise that certain practices create a risk of eliciting a false confession, it is impossible to quantify the risk. For example, Dr. Leo offered no evidence, short of his own intuition,

that the risk of a false confession is heightened in proportion to the aggressiveness of the interrogation or the severity of any threat or the perceived value of any promise of leniency. In this particular case, Dr. Leo readily admitted that he cannot say whether Mr. Yarborough's 1984 admissions were false, nor can he say which of his statements were true and which ones were false. Thus, while his testimony and the testimony of Dr. O'Connell might have been marginally helpful to the judge or jury in 1985, the question of whether Mr. Yarborough made false inculpatory statements would have been answered in 1985 the same way it would be today, based on Yarborough's demeanor and behavior, whether the statements had the ring of truth, whether he had any motive to falsify, and whether the statements were corroborated by other credible evidence.

Reasonably competent representation in 1985 did not require every defense attorney to develop the kind of sophisticated psychological testimony petitioner now relies on, much less the largely inadmissible expert testimony on false confessions.[10] This is particularly true where the

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[10] Had the question been presented at a jury trial, it is unlikely that this court would have permitted Dr. Leo to testify. Petitioners made little effort to show that Dr. Leo's methods for assessing the likelihood of a false confession were "sufficiently established to have gained general acceptance in the particular field" of social psychology and criminology. *See Pettus v. United States*, 37 A.3d 213, 217 (D.C. 2012) (citing *Frye v. United States*, 54 App. D.C. 46, 47, 293 F. 1013, 1014 (1923)). More importantly, most of his opinions are not "beyond the ken of the average layman" and would not materially "aid the [jury] in the search for truth." *Dyas v. United States*, 376 A.2d 827, 832 (D.C. 1977). To the contrary, such testimony from an "expert" (or a battle of experts) would run a significant risk of confusing a jury, and any possible benefit would likely be outweighed by "the potential

for . . . supplanting [the jurors'] customary role in evaluating testimony." *Green v. United States*, 718 A.2d 1042, 1051 (D.C. 1998); *see Dorsey v. United States*, 2 A.3d 222, 234 n.10 (D.C. 2010) (holding that it was not an abuse of discretion to exclude Dr. Leo's testimony because the "'factors and conditions' that Dr. Leo would discuss 'are the same factors and conditions that jurors traditionally consider in evaluating challenges to custodial statements by individuals suspected of having committed a criminal offense.'"). Permitting him to testify before a jury would create a risk that his own conclusions might supplant the jury's independent assessment of the truthfulness of a witness' testimony or confession. *See Blocker v. United States*, 110 U.S. App. D.C. 41, 51, 288 F.2d 853, 863 (1961) ("The hazards in allowing experts to testify in precisely or even substantially the terms of the ultimate issue are apparent. This is a course which, once allowed, risks the danger that lay jurors, baffled by the intricacies of expert discourse and unintelligible technical jargon may be tempted to abdicate independent analysis of the facts on which the opinion rests; this is also likely where the opinion giver is a skilled forensic performer.").

Several other courts have excluded expert testimony regarding false confessions for similar reasons. *See, e.g., State v. Polk*, 942 N.E. 2d 44, 47-56 (Ill. App. Ct. 2010) (not an abuse of discretion to exclude Dr. Leo's testimony because the proffered testimony was not beyond the common knowledge of ordinary citizens); *Vent v. State*, 67 P.3d 661, 667-70 (Alaska Ct. App. 2003) (no abuse of discretion where the trial court determined that the science of false confessions was not sufficiently refined under the standard of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and that the testimony would not appreciably aid the jury); *State v. Free*, 798 A.2d 83, 95-96 (N.J. Super. Ct. App. Div. 2002) (false confession testimony inadmissible under Frye because it has not gained general acceptance in the scientific community and is not beyond the ken of the average juror); *State v. Cobb*, 43 P.3d 855, (Kan. App. 2002) (Dr. Leo's testimony inadmissible because it "invades the province of the jury."); *State v. Davis*, 32 S.W.3d 603, 608-09 (Mo. Ct. App. 2000) (trial court properly excluded Dr. Leo's testimony because it would have "encroache[d] upon the jury's duty to determine the reliability of defendant's statement."); *see also* Paul G. Cassell, *The Guilty and the "Innocent": An Examination of Alleged Cases of Wrongful Conviction from False Confessions*, 22 HARV. J.L. & PUB. POL'Y 523 (1999).

thrust of Yarborough's motion to suppress was that the police beat the statement out of him under circumstances that would have caused the strong as well as the weak to succumb to the pressure and make a false statement. Assuming additional evidence of the defendant's low intellectual functioning and educational level might have marginally aided the presentation of the motion, it cannot be said that an otherwise competent defense attorney in 1985 was performing below the constitutional minimum standard by focusing on the heavy handed police interrogation techniques rather than on his client's individual vulnerability.

Nor would such evidence have changed the outcome on the motion to suppress. Mr. Yarborough did lie in his statement to the police, but he did not lie about being present at the scene of the Fuller murder. The evidence overwhelmingly put him there.[11] He lied when he claimed that

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To the extent that Dr. O'Connell went beyond reporting on his psychological testing of Mr. Yarborough and strayed into the "science" of false confessions, his testimony would have been similarly excludable for many of the foregoing reasons. *See Michigan v. Kowalski*, No. 141932, 2012 Mich. LEXIS 1225, at *41 n.64, and accompanying text (Mich. July 30, 2012) (en banc) (proposed expert testimony that went beyond psychological testing excluded inasmuch as it "relied on the same unreliable foundation that [the court] rejected with respect to [Dr.] Leo's testimony.").

[11] For example, in addition to Yarborough's own admission on October 4, 1984, Melvin Montgomery testified at the hearing and at trial that he was certain that Yarborough was at 8th and H Streets that afternoon, see Hearing Tr., Apr. 24, at 485-86; Trial Tr., Nov. 4, 1985, at JX1:2621-22; and Yarborough's own brother told the grand jury that when he confronted Yarborough about his role in the crime, Yarborough admitted that he was in the area, and claimed that the group asked him to join them but he declined right before the group descended on Mrs. Fuller. Grand Jury Tr., GX 112, Apr. 29, 1985, at 38-40, 43.

he was a mere observer and played no role in the attack, robbery and murder of Mrs. Fuller. This was not the statement of a helpless mentally vulnerable young man being fed facts by the police and parroting them back to please his interrogators; it was the voluntary admission of a conniving youthful offender trying to distance himself as far as possible from the crime while not denying that he was there, which he assumed the police already knew. No amount of psychological testing or social science research was likely to convince the court that this false exculpatory statement should be suppressed, particularly where the judge did not believe the defendant's claim about physical coercion in the first place. *See* Trial Transcript, *United States v. Catlett*, (hereinafter "Trial Tr."), Oct. 22, 1985, at JX1:718-19.

In addition, Mr. Yarborough's testimony at the hearing on his current motion was patently incredible.[12] He testified that he was at his girlfriend's house at the time of the murder; but when he first talked to the police on October 4, 1984, three days after the murder, he claimed that he was at a basketball practice on Maryland Ave. that afternoon. Hearing Tr., May 10, at 2476-79, 2565-66 (testimony of Det. McGinnis). Only after the police were able to discredit that alibi did he admit that he was at the scene of the murder at the time it occurred, though he continued to deny he had anything to do with it. Yarborough Statement, Oct. 4, 1984, JX 9. He testified that he had no memory of saying any of the things attributed to him in the October 4 statement. Although he admitted placing his initials after each line of the eight page typewritten

[12] Mr. Yarborough did not testify in 1985, either at the hearing on his motion to suppress or at the trial itself.

statement, he claims that the police typed the entire statement before they began questioning him and that the detective covered over the text with his hand so Yarborough could not see what was written when they told him to initial it. He testified that after he was arrested on December 9, 1984, the detectives interrogating him literally threw him around the room forcefully enough to break his knee on a cabinet, and that one detective stuck his head in a toilet causing an injury to his head, which was supposedly treated by an unidentified female police officer. Hearing Tr., Apr. 23 at 60-242; Apr. 24, at 249-67.

The evidence fails to bear out any of these extraordinary claims. Though Yarborough did complain of an injury to his knee and was treated briefly at an emergency room, he told Det. McGinnis that the injury was the result of a sports accident.[13] No witness observed any injury to his head. And, most importantly, his demeanor on the videotape of his interrogation shows him to be entirely relaxed, spontaneous, and in no distress. Many of the things Yarborough said on the videotape seem unlikely when compared with other evidence, but there is no indication that the facts he chose to include came from the police or from any source other than him. For example, when the detectives tried to get him to admit that he received money that was part of the proceeds of the robbery of Mrs. Fuller, he adamantly insisted that the two dollars he received from petitioner Catlett was a loan that came from other money Catlett had in his pocket, not from the

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[13] Although the trial judge considered a medical record, which included a statement attributed to Yarborough that he injured his knee "during [the] arrest," the judge credited Det. McGinnis, who testified that Yarborough told him he injured his knee playing sports. Trial Tr. Oct. 22, 1985, at JX 1:718.

proceeds of the robbery. Yarborough Video Statement, Dec. 9, 1984, JX 4.

Contrasted with Mr. Yarborough's version of the interrogation is the credible testimony of the interrogating detectives and the prosecutor who observed parts of the interrogation. Unfortunately, because of age and the passage of time, Detective Sanchez-Serrano appears to have certain memory deficits, but he does confidently remember that he engaged in none of the extreme tactics of which Mr. Yarborough accused him — no slamming into the wall, no head in the toilet, none of it. He did admit to raising his voice and simulating anger at Mr. Yarborough for lying to him, once pretending to rip off his shirt or his jacket, but this was bland compared to the kind of third degree Mr. Yarborough described. Hearing Tr., May 8, at 2060-2161; May 9, at 2166-2355. Detective McGinnis has a better memory of the Yarborough interrogation than detective Sanchez-Serrano, and he credibly denied virtually all of Mr. Yarborough's outlandish allegations. Hearing Tr., May 10, at 2509-21. In addition, Assistant United States Attorney Goren observed Yarborough before and during the interrogation, and he too saw no evidence of physical abuse or violent tactics that might lend credence to Mr. Yarborough's claims. Hearing Tr., May 2, at 1609-11. Finally, all of this was litigated at trial in 1985, and the trial judge found that Yarborough's waiver of *Miranda* rights and ensuing statement were entirely voluntary and not the product of police coercion or abuse. Trial Tr., Oct. 22, 1985, at JXI:718-19. The Court of Appeals accepted those findings in affirming the denial of Yarborough's suppression motion. *Catlett*, 545 A.2d at 1209. For these reasons, Mr. Yarborough's testimony cannot be credited, and the type of evidence he now faults his lawyer for not

putting on would not have changed the outcome of the motion to suppress or the outcome of the trial.

II. Innocence Protection Act

For a conviction to be vacated and a criminal charge dismissed with prejudice under the Innocence Protection Act ("IPA"), a petitioner must prove by clear and convincing evidence that he or she is "actually innocent" of the crime. D.C. Code § 22-1435 (g)(3). To obtain a new trial, a petitioner must prove that it is more likely than not that he or she is actually innocent of the crime. D.C. Code § 22-4135 (g)(2); *Richardson v. United States*, 8 A.3d 1245, 1247-48 (D.C. 2010). In assessing a petitioner's claim, the court "may consider any relevant evidence," but must consider:

> (A) The new evidence;
>
> (B) How the new evidence demonstrates actual innocence;
>
> (C) Why the new evidence is or is not cumulative or impeaching; [and]
>
> (D) If the conviction resulted from a trial, and if the movant asserted a theory of defense inconsistent with the current claim of innocence, the specific reason the movant asserted an inconsistent theory at trial.

D.C. Code § 22-4135 (g)(l)(A-D).

Petitioners offer no new scientific evidence. They rely entirely on the recantations of several witnesses who testified against them at their trial in 1985. In addition to Mr.

Yarborough himself — who repudiated his two statements to the police and denied being present when Mrs. Fuller was murdered, claiming that he remembers being with his girlfriend at her house several blocks away — petitioners offer the testimony of four recanting witnesses: Calvin Alston, Harry James "Derrick" Bennett, Linda Jacobs, and Melvin Montgomery.

To accept petitioners' claim with respect to Mr. Alston and Mr. Bennett, one must begin by suspending one's disbelief that a person would plead guilty to murder (Alston) and manslaughter and robbery (Bennett) and accept a sentence of many years in prison, all based on lies the police pressured them to tell against themselves and their close friends who, based on those lies, would be convicted and spend the rest of their lives in prison. Further, as with any recantation, the court is necessarily confronted with a witness who has demonstrated a willingness to lie under oath. The sanction of the oath that might otherwise lend credence to the recantation is nullified by the fact that the former testimony the witness is recanting was also under oath. If either version is true, the other must necessarily be false, yet both were given under the sanction of the same oath. For this reason, courts are uniformly skeptical of witnesses who come forward long after their testimony to say that everything they previously said under oath was a lie. *See, e.g., Dobbert v. Wainwright*, 468 U.S. 1231, 1233-34 (1984) ("Recantation testimony is properly viewed with great suspicion. It upsets society's interest in the finality of convictions, is very often unreliable and given for suspect motives, and most often serves merely to impeach cumulative evidence rather than to undermine confidence in the accuracy of the conviction."); *V.C.B. v. United States*, 37 A.3d 286, 291-92 (D.C. 2012) ("[C]ourts often view re-

cantations of previous accusatory statements with suspicion or skepticism . . . in part because 'witnesses offering recantations are often facing radically different pressures than [*sic*] they were at the time of the initial trial' " (citing *Wadlington v. United States*, 428 F.3d 779, 784 (8th Cir. 2005) and quoting *Higgs v. United States*, 711 F. Supp. 2d 479, 513 (D. Md. 2010))); *Johnson v. United States*, 33 A.3d 361, 371 (D.C. 2011) ("Recanting affidavits and witnesses are looked upon with the 'utmost suspicion . . . .'" (quoting *United States v. Kearney*, 220 U.S. App. D.C. 379, 384, 682 F.2d 214, 219 (1982))).

Even if one were to get past the inherent reasons for skepticism that cast doubt on any recantation, the recantations of Calvin Alston and Harry Bennett are not worthy of belief. The court had an opportunity to hear their testimony under oath, observe their demeanor, compare it to their demeanor on their videotaped interrogations on November 29, 1984 (Alston), and February 6, 1985 (Bennett), review their trial testimony under oath, and compare their testimony to the testimony of all the other witnesses at trial who placed some or all of the petitioners at the scene. In this context, the current testimony of Alston and Bennett that they were not at 8th and H Streets on October 1, 1984, and that they were forced by the police to say they were there and to name the others who were there is nothing short of preposterous. The scene in the alley on October 1, 1984, was crowded and chaotic. Alston and Bennett may have gotten some facts wrong and may have left certain things out or distorted the truth to minimize their own involvement or to protect others, but the basic facts implicating these petitioners and describing a crime perpetrated by a large group were corroborated by too many other witnesses not to be believed. The notion that Alston and Bennett were not present and made it all

up cannot be credited when juxtaposed with their videotaped statements, their guilty pleas, Alston's admissions to other witnesses, Alston's trial testimony and Bennett's grand jury and trial testimony. Both witnesses were extensively cross examined at trial by ten seasoned defense counsel over the course of several days about the many discrepancies and inconsistencies in their respective versions of events. It is exceedingly unlikely that any juror would have concluded that Alston and Bennett were not on the scene or that they were not accurately reporting at least most of what they saw, heard, and did that day. Their motives for now coming forward cannot be known. Both are now out of prison and no longer seeking release from the parole board, where their current lack of remorse might be held against them. Back in their communities, perhaps even this many years later they are still burdened with guilt from having benefitted themselves by sending their friends to prison. Whatever their current motivation may be, the court does not credit their recantations, and their attempt at exculpation does not help the petitioners meet their burden of proving actual innocence. *See Godfrey v. United States*, 454 A.2d 293, 300 n. 26 (D.C. 1982) ("The trial court should not have to grant a new trial on the basis of an unsubstantiated recantation, since witnesses may recant for numerous reasons that have nothing to do with furthering truth or justice.").

The testimony of Linda Jacobs is even less helpful to petitioners than Alston and Bennett. Ms. Jacobs was, to say the least, an uncooperative witness for the prosecution at trial. Eventually, after much coaxing and cajoling, she admitted she was present at the murder scene and related what she saw. At trial she managed to get through most of her testimony, but when she got to the part where she was asked to describe the brutal rectal sodomy of Mrs.

Fuller, she broke down sobbing. Trial Tr., Nov. 14, 1985, at JX1:4626-32. At the post-conviction hearing, all she could remember is that everything she said at trial was a lie. She does not remember what she said or why she said it, she just knows it was a lie. The following excerpt is illustrative:

BY MS. WESTON [THE PROSECUTOR]

Q. Do you remember testifying at trial in this case?

A. Yes.

Q. So, you do remember testifying in front of a jury that was sitting in a jury box like this?

A. But I don't remember that, ma'am. I know I went to court because I lied.

Q. I'm not talking about what you said right now. I'm talking about being present?

A. Like I said, I don't remember.

Q. So, you don't remember being present at a trial?

A. Okay. If that's what you want to say.

THE COURT: What do you want to say?

THE WITNESS: I told her I don't remember. She keep asking the same question.

THE COURT: No, you said you did remember. Now you say you don't remember.

THE WITNESS: No, I don't remember. She said in front of the jury. I don't remember.

THE COURT: Now, she's talking about the trial itself.

THE WITNESS: I said I did because I remember lying.

THE COURT: How do you remember lying if you don't remember being there?

THE WITNESS: Because I lied on them guys.

THE COURT: That's all you remember?

THE WITNESS: Yep, that's all I remember was lying. I been dealing with that all my life; that I lied.

THE COURT: Okay.

BY MS. WESTON:

Q. So, ma'am is it your testimony that you don't remember anything you said at all?

A. All I know is I lied. That's all I remember.

Q. So, you don't know what you said, but you know it was a lie?

A. Yep.

Hearing Tr., May 1, at 1222-23.

Ms. Jacobs testified that she did not even remember saying in her affidavit dated September 20, 2007, that everything she said at trial was a lie *except* for the part about the girl telling her to go into the alley to find petitioner Kelvin Smith, nor does she remember today whether that part of her affidavit is true. *Id.* at 1208-09. In her affidavit she stated that she did go into the alley but that she did not see the attack on Mrs. Fuller or any of the petitioners. Jacobs Aff., Sept. 26, 2007, at JX156:002 ¶ 7. At the hearing she testified that she did not go into the alley at all that day. She does not remember where she was; she just knows she was not there. Curiously, however, whenever she was asked if she saw any of the attack or the act of sodomy against Mrs. Fuller, Ms. Jacobs broke down sobbing just the way she did when she was confronted with that visual image at trial. Hearing Tr., May 1, at 1238-39. As with Alston and Bennett, her motives for trying to help the petitioners after all these years are unclear. She was a recalcitrant witness from the beginning, and perhaps she has simply flipped back to her pretrial denial mode. Regardless of her motives, however, her insistence that she lied coupled with her inability to remember anything that she lied about makes her current testimony relatively useless and adds nothing to petitioners' claims of innocence. Hearing Tr., May 1, at 1204-41; *see Meade v. United States*, No. 09-CO-1425, slip op. at 14 (D.C. July 26, 2012) (a witness' purported recantation was particu-

larly unreliable because it "did not indicate with any specificity or clarity just which parts of her prior account were untrue.").

Melvin Montgomery was to have been petitioners' fourth recanting witness, but his testimony at the hearing actually supported the government. Mr. Montgomery did not see the assault on Mrs. Fuller, but he was in the park at 8th and H Streets on October 1, 1984. In his detailed trial testimony, Montgomery explained that he spent the majority of that day either at the park or in the various shops on H Street. He was able to account for all of his activity that day, including every store he visited and every friend he had a conversation with, even remembering such seemingly mundane details as a game he watched at the arcade on H Street. Trial Tr., Nov. 4, 1985, at JX1:2569-2639. He specifically remembered seeing several petitioners in the park that morning when he was walking to pick up his daughter from school, and again that afternoon when he returned to 8th and H Street with his friends. *Id.* at JX1:2577-85. He also distinctly recalled seeing Clifton Yarborough near the park later in the afternoon, trying to break up a fight between two younger boys. *Id.* at JX1:2620-22. And he watched as the petitioners spotted Mrs. Fuller walking across the street, targeted her as a robbery victim, and crossed the street to begin the assault that wound up taking her life. *Id.* at JX1:2610-17.

Petitioners submitted an affidavit from Mr. Montgomery dated June 1, 2009, which purported to say that his entire trial testimony was a lie. Montgomery Aff., JX 157:1-3. According to the affidavit, he saw petitioners in the park on the morning of October 1, 1984, but not in the afternoon. In fact, based solely on the affidavit, one might

conclude that Mr. Montgomery was not even at the park that afternoon: in paragraph nine he states that he went back to the park around 3:15 p.m. and did not see anyone he knew other than Yarborough, but in paragraph seventeen, he claims that "I wasn't even at the park in the afternoon."

When called as a witness, Mr. Montgomery disavowed parts of his affidavit, stated emphatically that he did not tell the person who prepared the affidavit that he had lied in his prior testimony, and testified on cross examination that everything he said before the grand jury and at trial was the truth. Hearing Tr., Apr. 24, at 433-86. In response to a question from the court regarding how confident he was that he saw Clifton Yarborough at the park that afternoon, Montgomery replied without hesitation, "I'm certain I seen Clifton Yarborough. He wasn't in the park. He was on the side of H Street coming toward government [sic] Street because it was a fight. And I was trying to tell him to go ahead on because somebody was going to call the police. It had to be after — I know it was after 3:00." *Id.* at 485-86. This testimony parallels Montgomery's trial testimony, in which he claimed that he saw Yarborough trying to break up a fight between two boys. Responding to a question from petitioner's counsel regarding whether he (Montgomery) was confused as to what time he picked up his daughter, Montgomery confidently asserted, "She got picked up at noon." *Id.* at 468.

In an effort to salvage a bad turn of events, petitioners called the investigator who interviewed Mr. Montgomery in connection with the preparation of his affidavit; but she only served to muddy the waters further by testifying that although she took a statement from Mr. Montgomery at a prison, someone else drafted the affidavit, apparently

based on her notes. When confronted with the glaring inconsistency between paragraphs nine and seventeen of Montgomery's affidavit, the investigator could only say, "Unfortunately, I did not catch that." Hearing Tr., Apr. 25, at 508. Whatever else can be said of Mr. Montgomery's "recantation," it certainly cannot be said that his testimony helps petitioners to meet their burden of proving actual innocence.

After considering all of the evidence, both at trial and at the hearing, the court concludes that petitioners have not come close to demonstrating actual innocence. *See Bell v. United States*, 871 A.2d 1199, 1202 (D.C. 2005) ("[I]f the judge reasonably finds the recantation [in an IPA case] to be not credible, that determination properly 'ends the inquiry' . . . into whether the movant has met his burden of showing that he was in fact innocent." (quoting *United States v. Herbin*, 683 A.2d 437, 441 (D.C. 1996))). Unquestionably, they have not proved by clear and convincing evidence that they are actually innocent, and just as surely they have not established their innocence by a preponderance of the evidence. Accordingly, petitioners are not entitled to relief under the Innocence Protection Act.[14]

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[14] Although petitioners' IPA claim begins and ends with the recanting witnesses, they offer two additional arguments in support a finding of "actual innocence" under the IPA: (1) "unrebutted scientific evidence" proves that Mrs. Fuller was beaten by one to three attackers, and statements by government trial witnesses to the contrary must have been false; and (2) "factual and scientific similarities" between the murder of Mrs. Fuller and James McMillan's murder and sodomy of a young woman in 1992 suggest that both crimes were likely committed by the same person. Pet. Brief at 176-80. Petitioners' "unrebutted scientific evidence" consists of the testimony of Dr. Richard

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Callery, a forensic pathologist, who reviewed Mrs. Fuller's 1984 autopsy and concluded that she was probably attacked by fewer than three assailants, and Larry McCann, a retired police officer and crime scene reconstruction expert, who reviewed photos and diagrams of the crime scene and the injuries described in the autopsy report and similarly concluded that the pattern of injuries on the victim was most consistant with a crime committed by one person. Hearing Tr., Apr. 26, at 757-59 (testimony of Dr. Callery; Hearing Tr., Apr. 30, at 1083 (testimony of Mr. McCann). This testimony does not qualify as "new evidence" under the IPA. *See* D.C. Code § 22-4131 (7). "The new evidence provision of the IPA is broader and more inclusive than the judicial test for newly discovered evidence under Super. Ct. Crim. R. 33, as the IPA specifically provides for evidence that was known at the time of trial but could not be produced, and for consideration of evidence that could not be compelled or otherwise obtained. However, the diligence requirements in the IPA and Rule 33 are the same, as both require 'reasonable' or 'due' diligence." *Bouknight v. United States*, 867 A.2d 245, 255 (D.C. 2005). Petitioners could have presented testimony from experts similar to Dr. Callery and Mr. McCann at trial. Neither expert used any type of new evidence or scientific testing to reach his conclusions: Dr. Callery relied on the 1984 autopsy report, and Mr. McCann evaluated police reports, crime scene photographs and diagrams, and other documents related to Mrs. Fuller's murder. While they apparently developed different opinions than those of Dr. Bray, the medical examiner who testified at trial, the IPA does not permit a defendant to reopen his case simply because he finds a new expert to look at old evidence and come to a different conclusion. *See United States v. Ugalde*, 861 F.2d 802, 806 (5th Cir. 1988) (noting that due diligence "requires that the evidence itself, not merely the legal implications of the evidence, be 'newly discovered.'"). In any event, neither Dr. Callery nor Mr. McCann could definitively state that Mrs. Fuller was attacked by one to three individuals as opposed to a larger group. While both testified that, in their opinion, it was more likely that a small number of individuals inflicted the injuries on Mrs. Fuller, both admitted that it was possible that a greater number of persons were involved. Hearing Tr., Apr. 26, at 778-83; Hearing Tr., Apr. 30, at 1094-99. Given the court's rejection of the recantations and the other trial evidence pointing to an attack by ten or more assailants, petitioners' "unrebutted scientific evidence," even if it were new, is not particularly persuasive and does not begin

III. *Brady v. Maryland*

Unlike petitioner Yarborough's claim and petitioners' IPA claims, petitioners' *Brady* claims are not so easily dismissed. Although *Brady v. Maryland* was decided in 1963, our understanding of its implications has evolved over time. Information that would be disclosed today under Justice Department guidelines and relatively recent caselaw would not have been routinely turned over to the defense in 1985. If one were to pick the bones of almost any murder case litigated around the time of the Fuller murder, one would inevitably discover in the police or prosecutor's files pieces of information that, in retrospect, were arguably favorable to the accused, would likely be turned over if the case were tried today, but were not turned over at the time through inadvertence or a narrow,

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to demonstrate that the petitioners are "actually innocent." D.C. Code § 22-4135 (g).

In 1993, a jury convicted James McMillan of murdering and sexually assaulting a young woman in 1992. Judgment & Commitment Order, *United States v. McMillan*, F 10635-92, at JX52:29-30. According to petitioners, because both Mrs. Fuller and McMillan's victim were attacked in an alley near 8th St. N.E., both were robbed and violently beaten about the face and torso and brutally sodomized, and both died of blunt force trauma, the two crimes were so similar that they must have been committed by the same perpetrator. Pet. Brief, at 179-80. James McMillan's role in this case is addressed in more detail in the discussion of petitioners' *Brady* claims. However, petitioners' own witness, Dr. Callery, admitted that the injuries to McMillan's 1992 victim were more extensive than those inflicted upon Mrs. Fuller, and noted that these two brutal murders could not be characterized as signature crimes. Hearing Tr., Apr. 26, at 789-90. Whatever may be said of the similarities between the two crimes, they certainly do not prove that James McMillan murdered Mrs. Fuller to the exclusion of these seven petitioners, when all of the credible evidence points the other way.

though prevalent, understanding of the government's obligations under *Brady*. And the Fuller case was not just "any murder." The brutality of the killing, the vulnerability of the diminutive victim, and the pack mentality of the assailants inflamed the passions of the entire community. First one, and later two, Assistant United States Attorneys worked on the case full time, together with a dedicated team of nine detectives and police officers. The investigation took nearly a year, even after the arrest of most of the accused. More than four hundred witnesses were interviewed, many of whom were put into the grand jury. In all, seventeen young people were arrested, thirteen were indicted, and ten were taken to trial.[15] In an investigation this complex and extensive, it is almost inconceivable that mistakes would not be made. In addition, because of the passage of time in this case, it is difficult for the parties to ascertain precisely what was disclosed and what was not.[16]

To make out a claim under *Brady v. Maryland*, petitioners must establish three elements: (1) the information not disclosed must be "favorable" to the defendant, (2) the

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[15] See n.3, supra.

[16] For example, in his April 2010 motion, Christopher Turner claimed that the government never disclosed information that it recovered Mrs. Fuller's rings from a man and woman who claimed to have purchased the rings from another man and woman, whose descriptions did not match any of the defendants. See Amended Memorandum and Points of Authorities in Support of Motion to Vacate Conviction or in the Alternative for a New Trial, United States v. Christopher Turner, Apr. 6, 2010, at 38-39. The petitioners did not address this claim at the post-conviction hearing, presumably because, as AUSA Goren explained in his testimony, information about the rings was disclosed to defense attorneys prior to the 1984 trial. Hearing Tr., May 3, at 1654-55. In any event, petitioners have wisely abandoned this point in their post-hearing brief. Pet. Brief at 126 n.7.

information must have been suppressed or withheld by the prosecution, and (3) the information must be "material" to guilt or punishment. *Strickler v. Green* 527 U.S. 263, 281-82 (1999). In this context, evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). Materiality is shown if, in the context of the entire case, the non-disclosure undermines the court's confidence in the outcome of the trial. *Kyles v. Whitley*, 514 U.S. 419, 434-37 (1995). Of course, if the court had credited the recantations in this case, non-disclosure of favorable evidence could be sufficient to undermine the court's confidence in the outcome, even though petitioners are unable to meet their burden of proving actual innocence. However, having rejected the recantations as incredible, including Mr. Yarborough's own self-serving testimony, the court must decide petitioners' *Brady* claims in light of all the evidence supporting the verdict, including the trial testimony of witnesses Alston, Bennett, Jacobs, and Montgomery.

Petitioners assert a number of discrete *Brady* claims, but they focus primarily on two strands of potentially favorable evidence the government failed to disclose. First, a woman named Ammie Davis, under arrest for a minor offense on October 26, 1984, asked to speak to the officer in charge and told Fifth District Lieutenant Frank Loney that she witnessed her friend James Blue, acting alone, abduct and murder Catherine Fuller in the alley behind H Street on October 1, 1984. JX 20. Lt. Loney took her statement and passed it on the Homicide Branch, but he does not recall how he transmitted it or who may have received it at Homicide. In any event, the statement did not resurface in the Fuller investigation until August of 1985,

many months after the arrest of the petitioners and the development of the prosecution's theory of the case as the work of a large group of young men who regularly hung out in the park at 8th and H Streets, N.E. Assistant United States Attorney Goren, upon learning of the statement, interviewed Ammie Davis and Lt. Loney, although he testified that he does not remember the details of his conversation with Loney, and Loney testified that he does not even remember the meeting. For a variety of reasons, Goren did not credit Ammie Davis and did not believe she was a witness to any part of the Fuller murder. He did not disclose her identity or her statement to the defense. James Blue shot Ammie Davis in October of 1985, and she died of her injuries two weeks before the start of petitioners' trial. Gov. Sentencing Mem., *United States v. Blue*, F7848-85, July 16, 1987, JX 38.

The second significant non-disclosure relates to statements of three witnesses who were in the alley shortly after the murder and saw two men acting suspiciously, one of whom appeared to be placing or concealing an object under his coat. The witnesses reported that the two men fled the alley just as the police arrived in response to the 911 call reporting the discovery of Mrs. Fuller's body in the garage. The two men were identified as James McMillan and Gerald Merkerson. McMillan lived in a house that backed up to the alley. He had been recently charged with two purse snatching assaults in that same neighborhood. The government disclosed to the defense that a street vendor named Freeman, who was the first person to discover Mrs. Fuller's body, had observed two men in the alley who fled when the police arrived, but the government did not disclose the identity of the two men, the names of the two other witness who saw them in the alley, or the

other assaults McMillan was alleged to have committed against women in the same neighborhood.

Petitioners contend that the Ammie Davis/James Blue tip and the James McMillan evidence would have offered the defense a "counter-narrative," from which they would have been able to construct a defense that Catherine Fuller was not murdered by a mob of young men, as the prosecution alleged, but by one perpetrator, or perhaps two, who were not arrested or charged. In an effort to establish this alternative theory, petitioners introduced expert testimony of Dr. Richard Callery and Larry McCann.[17]

A. Ammie Davis

"For there to be a true *Brady* violation, '(1) the evidence at issue must be favorable to the accused either because it is exculpatory or because it is impeaching; (2) [the] evidence must have been suppressed by the [government], either willfully or inadvertently; and (3) prejudice must have ensued,' meaning that the suppressed evidence must have been material." *Mackabee v. United States*, 29 A.3d 952, 959 (D.C. 2011) (quoting *Fortson v. United States*, 979 A.2d 643, 662 (D.C. 2009)); *Strickler*, 527 U.S. at 281-82. There is little question that Ammie Davis' statement meets the first two elements. The government concedes that the statement was favorable to petitioners and that it would voluntarily disclose such a statement today

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[17] See n.14, *supra*. In support of their "counter-narrative" pinning the crime on James McMillan, petitioners also presented a stipulation that Dr. Fred Berlin, if called, would have testified as an expert in sexual dysfunctions that an individual who commits an act of violent anal sodomy is likely to commit the act more than once. Hearing Tr., Apr. 27, at 805.

under current Justice Department policies. *See* Government's Hearing Summary and Proposed Conclusions of Law (hereinafter "Gov. Brief") at 34 n. 19. However, petitioners must also show that the statements were material, meaning that "there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Smith v. Cain*, 565 U.S. ___, ___, 132 S. Ct. 627, 630 (2012) (quoting *Cone v. Bell*, 556 U.S. 449, 469-70 (2009)). "A reasonable probability does not mean that the defendant 'would more likely than not have received a different verdict with the evidence,' only that the likelihood of a different result is great enough to 'undermine[ ] confidence in the verdict.'" *Smith*, 132 S. Ct. at 630 (quoting *Kyles*, 514 U.S. at 434.

Ammie Davis' accusation of James Blue was thoroughly discredited, and its non-disclosure does not undermine the court's confidence in the outcome of the trial. For Ms. Davis' account to be true, a jury would have to believe that James Blue, acting alone, attacked and murdered Mrs. Fuller, in the face of numerous eyewitness accounts and other evidence proving that crimes were committed by a large group of young men acting in concert, playing different roles. Even if Ms. Davis had lived to tell her story,[18] any reasonable jury, in light of all the evidence,

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[18] James Blue murdered Ammie Davis in October of 1985, and she would not have been available as a witness for the defense. Her statement to Lt. Loney was almost certainly inadmissible. Petitioners make the dubious argument that if the government had turned over her statement in August 1985, when it turned over other Brady evidence, "defense counsel . . . could have — and likely would have — warned Ms. Davis to avoid the man she was implicating in the crime in advance of trial, raising the possibility that she would not have been murdered by Mr. Blue on the eve of trial" and therefore would have

would surely have rejected it. Not one of the approximately 400 other witnesses interviewed by the government mentioned James Blue as a possible perpetrator, either alone or with others. Moreover, Ms. Davis' account, even as told to Lt. Loney, was riddled with problems. She first told Lt. Loney that she saw James Blue murder Mrs. Fuller, but later in the same statement claimed that she only saw him abduct the lady and pull her into the alley. Her story contained very few details, even when prompted. She claimed that she witnessed the events with her girlfriend, whom she identified only as "Shorty." She promised to have Shorty call the Leiutenant, but she never did. In part because he did not believe Ms. Davis,

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been available to testify. Pet. Brief at 145. However, AUSA Behm testified that Mr. Blue did not kill Ms. Davis because she had, one year earlier, accused him of murdering Mrs. Fuller, but because on the day he shot her, she refused to give him some of her heroin. Hearing Tr., May 8, at 1991-92. Under these circumstances, it is fanciful to suggest that defense counsel could have prevented Ms. Davis' death. Petitioners argue further that even without Ms. Davis' live testimony, her statement to Lt. Loney could have been admitted under exceptions to the rule against hearsay. The only cases cited by petitioners for this novel point are inapposite. *Chambers v. Mississippi*, 410 U.S. 284 (1973), involved a much more reliable and highly corroborated confession by someone that he, not Chambers, committed the murder for which Chambers was tried. The Court carved out a very narrow exception for the admissibility of hearsay statements when "circumstances . . . provid[e] considerable assurance of their reliability." 410 U.S. at 312. The "forfeiture by wrongdoing" exception recognized in *Devonshire v. United States*, 691 A.2d 165, 168-69 (D.C. 1997), the other decision cited by petitioners, has nothing to do with this case. *See Giles v. California*, 554 U.S. 353, 367 (2008) ("'[T]he forfeiture by wrongdoing exception "applies only if the defendant has in mind the particular purpose of making the witness unavailable." (quoting 5 C. Mueller & L. Kirkpatrick, Federal Evidence § 8:134, p 235 (3d ed. 2007))).

Loney did not rush her statement to Homicide, but he did send it there.[19] When the statement finally surfaced in August of 1985, the government tried to find Shorty without success. By that time, the prosecution team had five co-defendants and five eyewitnesses, all of whom described, in one way or another, an attack on Mrs. Fuller by a large group of young men. None of them mentioned James Blue, and, while there were inconsistencies between the various statements, there was also significant overlap as to the names of the young men who were on the scene and participating in the attack, including these seven petitioners.

Notwithstanding his skepticism, AUSA Goren interviewed Ammie Davis. He testified that he found her "playful" and not serious or forthcoming, and he did not believe she was a witness to anything. Hearing Tr., May 3, at 1646-48. The petitioners are certainly correct that the prosecutor's duty to turn over evidence favorable to the

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[19] In 2012, Lt. Loney did not remember his impressions of Ms. Davis, but Det. Donald Gossage, who worked under Lt. Loney at the Fifth District and in 1985 was detailed to the Fuller investigation, recalled having a conversation about Davis with Loney:

> "Gossage: Well, I asked him [Loney] why he just didn't call somebody, and he said, well, he didn't believe what Ammie Davis had indicated in the statement; that she had changed her story several times, and he decided that it was just best for him to go ahead and take the statement, just so that they have that information, and send it down to the homicide unit.
>
> Q: Now, did she indicate to Lieutenant Loney - or did he indicate to you his assessment of her emotional state?
>
> A: He indicated he didn't - she was upset and she was scared, and he just felt that she kept changing her story around and that he didn't believe what she was saying."

Hearing Tr. May 9, at 2379-80.

accused is not excused simply because the prosecutor does not believe the evidence, *see Zanders v. United States*, 999 A.2d 149, 163-64 (D.C. 2010); but it is also understandable why, in context, this careful and fair-minded prosecutor did not believe this piece of evidence and did not consider it material.

Finally, the jury would have heard that earlier in 1984, Ms. Davis had accused James Blue of another murder, which the grand jury investigated and which turned out to be a false and vindictive accusation. By coincidence, AUSA Jeffrey Behm, who had joined the Fuller prosecution team by August of 1985 when the Ammie Davis statement came to light, had been assigned to investigate the murder of James Hider in February of 1984. Based on the false accusation of Ammie Davis in that case, he initiated the arrest of James Blue and argued successfully for his pretrial detention for several months. As the investigation wore on and he and the investigating detective completely lost faith in Ms. Davis' veracity, Behm eventually dismissed the case against James Blue and he was released. When Ms. Davis' name turned up in the Fuller case a year later, AUSA Behm was another voice in the room warning the members of the team that her accusation of James Blue could not be credited. Hearing Tr., May 8, at 1974-93.

For all of these reasons, the report of Ammie Davis was not material under the *Brady* definition. While it probably would be disclosed today under Justice Department policies that were not in effect in 1985, due process would not compel its disclosure today and petitioners' due process rights were not violated by its non-disclosure in

1985.[20] Even in its best light, it does not undermine the court's confidence in the outcome of the trial. Petitioners' expert witnesses have offered a plausible explanation of the physical evidence that would support a theory that Mrs. Fuller was murdered by one or two persons, but the credible evidence at trial, including the eyewitness testimony and the testimony of the medical examiner about the extent of Mrs. Fuller's injuries, is much more consistent with the guilt of these seven petitioners, and perhaps several more.

B. James McMillan

Petitioners' second major *Brady* claim suffers from many of the same defects as the first. Unlike James Blue, the name of James McMillan did come up during the investigation of the Fuller murder. Three witnesses identified McMillan as one of two men seen in the alley shortly after Mrs. Fuller's body was discovered and said that he appeared to be concealing something under his jacket. According to these witnesses, McMillan and the other man fled when the police arrived. The police knew that McMillan lived in a house bordering on that alley and knew that he had been responsible for at least two other attacks on

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[20] The United States Attorney's Office's current policy requires prosecutors to disclose information inconsistent with the crime as charged as well as impeachment evidence "regardless of whether it is likely to make the difference between conviction and acquittal." U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-500 (2008). This type of disclosure is without question beyond what Brady requires. *See Kyles v. Whitley*, 514 U.S. 419, 437 (1995) ("[T]he rule in *Bagley* (and, hence, in *Brady*) requires less of the prosecution than the ABA Standards for Criminal Justice, which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate.").

women in that vicinity. He was a person of interest in the Fuller investigation, and the police included his picture in the photo album it used with witnesses to try to identify the persons responsible for the murder. No one identified him.[21] The government disclosed before trial that a street vendor named Freeman had discovered Mrs. Fuller's body when he went back to urinate in the alley and that he later saw two men acting suspiciously in the alley near the garage who fled when the police arrived. The government did not disclose that Freeman had identified James McMillan as one of the two men, nor did it disclose that two other witnesses had also identified McMillan and Gerald Merkerson as the two men in the alley who fled when the police arrived. Petitioners contend that the government had a duty to disclose this information under *Brady* and, had it been disclosed, the defense could have developed an alternative theory that McMillan — alone or possibly with Merkerson — killed Mrs. Fuller, using as evidence his concealment of what may have been the murder

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[21] One of the co-defendants, James Michael Campbell, made an incriminating statement naming McMillan as one of the perpetrators, which he later disavowed. Until the first morning of trial, Campbell was joined with the others for trial. His statement would have been admissible against him but, under Bruton, the government could not have used it to prosecute McMillan. The government attempted, without success, to develop other evidence against McMillan in the nine months leading up to the indictments, but the statements of the three witnesses who saw him in the alley after the murder were not enough to obtain a conviction, and Campbell was the only one who placed him at the scene of the murder. For these reasons, McMillan was not indicted with the others. Campbell's lawyer became ill during voir dire of the jury. His case was severed and he eventually pled guilty to reduced charges.

weapon under his jacket, bolstered by "other crimes" evidence of McMillan's other assaults against women in the neighborhood.[22] Pet. Brief at 139-42.

In terms of proving a *Brady* violation, the "McMillan evidence" is arguably not even favorable to the accused, and it is definitely not material for the same reason the James Blue evidence was not material. Although McMillan, who lived nearby, was seen in the alley after the attack on Mrs. Fuller, no witness put him in the alley during the attack. Based on a reconstructed timeline of the relevant events, he could have been in the alley as short as fifteen minutes or as long as ninety minutes after the fatal attack. Hearing Tr., May 3, at 1668-73 (testimony of AUSA Goren). Moreover, even if he was present at the time of the murder, it would not prove anything about the guilt of these petitioners. He could have been a participant with these petitioners or one of the many bystanders. For the "McMillan evidence" to be material in the *Brady* sense, he would have had to have committed the crime by himself or with Merkerson to the exclusion of the petitioners, and that possibility flies in the face of all the evidence. The coincidence of McMillan's presence in the alley and his attacks on other women in that neighborhood around the same time might have provided useful ammunition in the hands often clever defense counsel at trial, but it does not override the overwhelming evidence of the guilt of

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[22] The issue of whom Mr. Freeman identified came up at petitioners' trial. Defense counsel asked the judge to order the government to disclose the information. The judge declined. Defense counsel stated that they would simply call Mr. Freeman as a witness in their own case. They did not do so. Trial Tr., Nov. 1, 1985, at JX1:2323-25. The issue of the judge's ruling was not raised on appeal. It is at least arguable that the issue is waived.

these petitioners or undermine the court's confidence in the jury's determination of their guilt at trial.

C. Petitioner's other *Brady* claims

Petitioners make a number of other subsidiary *Brady* claims, most of which can be addressed without extensive discussion. In brief, petitioners claim that the government withheld evidence that Kaye Porter lied to police at the behest of another government witness, Carrie Eleby; that Ms. Eleby was a habitual PCP user; that Linda Jacobs, discussed in section II, *supra*, told government agents she was not present at the murder after having admitted that she was there; that the aunt of witness Maurice Thomas did not recall him telling her about having just witnessed an attack on a person in the alley behind the 800 block of H Street, N.E.; that Anita Hicks told the grand jury that she did not see blood on petitioner Levy Rouse's pants on the evening of the murder; that three witnesses claimed to have been in the park prior to the murder and did not mention seeing the petitioners; and that both Alston and Bennett named certain individuals who were present at the scene, but those same individuals denied being present or offered credible alibis. Pet. Brief. at 146-51.

None of these non-disclosures, separately or together, is material under *Brady*. The government concedes that its failure to disclose Kaye Porter's admission that she lied, at Carrie Eleby's request, about having been in a car with Calvin Alston and hearing him admit his participation in the murder of Mrs. Fuller was inadvertent and that the information should have been disclosed. Gov. Brief at 38. AUSA Goren explained that other witnesses corroborated Eleby's report of Alston's admission in the car, Alston himself acknowledged that it was true, and that, by

the time Goren made *Brady* disclosures, Kaye Porter's role as a witness related solely to an admission by petitioner Timothy Catlett at a different time and place; because he disassociated the two events, he simply forgot to disclose her lie about having heard Alston's incriminating statement in the car. Hearing Tr., May 2, at 1575-76. This information could have been used to impeach both Eleby and Porter. However, Kaye Porter was a relatively minor witness against one defendant, and the cross examination of Eleby about other lies and inconsistent statements, all of which were disclosed, was very extensive.[23] There is virtually no chance that disclosure of this additional matter would have led to a different verdict, and its non-disclosure does not undermine the court's confidence in the outcome.[24]

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[23] During cross-examination, Ms. Eleby admitted that she lied before the grand jury, leading the court to give the jury the following perjury instruction: "With regard to the testimony of Ms. Eleby, the Court wishes to instruct you that the testimony of a witness who has admitted that she has previously not told the truth when she was under oath before the Grand Jury should be received with caution and scrutinized with care." Trial Tr., Dec. 9, 1985 at JX1:8235-36.

[24] Petitioners argue that evidence that Ms. Porter lied about Alston "is particularly significant because Ms. Porter later gave trial testimony about a different defendant, Timothy Catlett . . . that was strikingly similar to that which she had admittedly fabricated during her first interview with police." Pet. Brief at 147 (emphasis in original). This argument mischaracterizes Ms. Porter's testimony. With regard to Alston, she claimed that while in a car with him, Eleby, and several others, she overheard Alston tell Eleby that he was involved in the murder. *See* Hearing Tr., May 3, at 1796-98. By contrast, Porter's brief trial testimony was that while she and Catlett were sitting outside of a library, she asked him why did that to Mrs. Fuller, and he responded that "[a]ll he did was kick her and somebody else stuck the pole up in her." Trial Tr., Nov. 15, 1985, at JX1-04841. These two instances are not "strikingly similar." In the first, Porter claimed to

Similarly, it is at least arguable that the government should have disclosed the statement from Maurice Thomas' Aunt Barbara that she did not remember him telling her that he had just witnessed a group of young men assaulting a person in the alley. Maurice Thomas was an important eyewitness because he was able to identify several of the petitioners and had no apparent bias or motive to fabricate. He testified that while walking by the alley on the afternoon of the murder, he witnessed a large group of young men, including most of the petitioners, surround someone, pat her down, and begin to hit her. Trial Tr., Nov. 13, 1984, at JX 1:4305-09. He ran home and told his aunt what he saw, and she told him to forget about it and keep quiet. *Id.* at JX1:4309-10. AUSA Goren's contemporaneous notes corroborate that Thomas did not tell his aunt that he witnessed a brutal murder, but that he saw a group of people beating someone up, and also reveal Goren's impression that Aunt Barbara was a "bit of an alcoholic." Goren Notes, JX2:62. Those facts, coupled with Maurice's testimony that she told him to forget what he had seen, might have provided a complete explanation for her failure to "remember" what Maurice told her. In any event, Maurice Thomas testified convincingly as to what he witnessed on October 1, 1984, he was cross examined extensively and, even if he had been impeached by testimony that Aunt Barbara did not remember him telling her that he saw someone being robbed in the alley, no juror would have concluded that he was making it all up.

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have overheard a conversation while in a cramped car with several others present; in the second, she directly asked a good friend about his involvement in the murder, and she was extensively cross-examined about the veracity of her claim.

Carrie Eleby's use of PCP was the subject of cross examination at trial, and the government's failure to disclose its knowledge or opinion of the extent of her PCP use was not material under *Brady* as it certainly would not have changed the outcome. Similarly, the government's failure to disclose that Linda Jacobs had gone back and forth several times before finally admitting that she had been in the alley and was a witness to the events surrounding the murder was not material given all that the government did disclose about her inconsistent statements, her extensive cross examination at trial based on her inconsistent statements, and the jury's up close opportunity to observe her demeanor and assess her credibility. If the jury concluded that she was an eyewitness to the events on October 1, 1984, there is no chance it would have concluded otherwise if it learned that on more than one occasion she had denied that she was there.

Anita Hicks was the aunt of Gail Hicks, who had a child by petitioner Levy Rouse. Rouse lived with her family. She testified at the Grand Jury that Rouse was not at home between 4:00 p.m. and 8:00 p.m. on October 1, 1984, but that shortly after 8:00 p.m., he came home and told her that police found a girl in the alley. Grand Jury Tr., GX112, May 21, 1984 at 10-11. Near the end of her testimony, a juror asked her whether she "recall[ed] seeing anything unusual that night about the way Levy was dressed or seeing any blood on his clothes," and she replied, "No." *Id.* at 14. Petitioners argue that Hicks' testimony would have impeached Katrina Ward, who was called to rebut Rouse's alibi testimony that he went to see Ward shortly after 6:30 p.m. on October 1 and stayed for several hours. Ward testified that Rouse visited her around 8:30 or 9:00 p.m., and that he had some blood on the bottom of his pant leg. Trial Tr., Dec. 2, 1985, at

JX1:7426-27. Hicks' testimony that she did not notice any blood on Rouse's pants when she saw him briefly in the middle of a chaotic evening at home would not have effectively impeached Ward. In fact, her testimony would have bolstered Ward's damaging testimony that Rouse did not visit her until 8:30 or 9:00 p.m., further undermining Rouse's alibi.

Finally, the non-disclosure of denials by witnesses whom Alston or Bennett placed on the scene, and the alibis offered by some of those witnesses, cannot be the basis of a *Brady* claim. The trial judge ruled that these statements did not need to be disclosed, and the prosecutors relied on those rulings. The defense at trial was aware of the judge's rulings and they did not raise the issue on appeal. Therefore it is procedurally defaulted. *Wu v. United States*, 798 A.2d 1083, 1089-90 (D.C. 2002) (citing *United States v. Frady*, 456 U.S. 152, 167-68 (1982)). Even if the issue were not defaulted, the information is not favorable to the accused except in the most far reaching interpretation of *Brady*, and it is certainly not material in the sense that it might have changed the outcome at trial. The fact that some of the named individuals had alibis, which may or may not have been truthful, did not exculpate any of the defendants and does not undermine the court's confidence in the jury's determination of the guilt of these petitioners. The same can be said of witnesses who knew the petitioners but did not mention seeing them in the park or in the alley on October 1, 1984. The trial judge ruled that the government must disclose a witness who knew a particular defendant and said that defendant was not on the scene, but need not disclose any witness who simply neglected to mention seeing one of the defendants, even if the witness knew that defendant. Here, too, the defense

was aware of that ruling did not raise it as error on appeal.[25] Moreover, like the other category, the omission of a defendant in a witness' description of events does not prove the defendant was not part of this chaotic scene; and given all of the other evidence establishing beyond doubt that each of these petitioners was present and participating in the robbery and murder of Catherine Fuller, the non-disclosure of this category of information does not undermine the court's confidence in the outcome of the trial.

CONCLUSION

Petitioners' claims are based almost entirely on the recantations of Calvin Alston, Harry Bennett, Linda Jacobs, and Melvin Montgomery. For the reasons stated above, not one of those recantations is credible, and the best reading of Montgomery's testimony is that he is not recanting at all. Having heard the "new" evidence, the court is convinced that the totality of evidence pointing to the guilt of these seven petitioners, and others, in the abduction and murder of Catherine Fuller on October 1, 1984, remains — as the Court of Appeals first characterized it — "overwhelming." Because petitioner Clifton Yarborough was not denied effective assistance of counsel, he is not entitled to post-conviction relief independent of the claims of the other petitioners. Moreover, although Yarborough's videotaped statement on December 9, 1984, implicating the other petitioners was not admissible against his co-defendants at trial because of the strictures of *Bruton v. United States*, in the present context his statement is further evidence of the guilt of the other six petitioners,

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[25] Petitioner Overton did raise a similar Brady issue on appeal with respect to a witness who testified at trial, which the Court of Appeals rejected without deciding whether the information should have been disclosed earlier. *Catlett*, 545 A.2d at 1216.

as are the statements of other co-defendants. Altogether, at least ten witnesses, including several of the charged defendants, described the events that led to the robbery and murder of Mrs. Fuller and identified these petitioners as having participated in one way or another. Their statements corroborated each other and were corroborated by other evidence. Against this background, petitioners cannot carry their burden of proving that they are "actually innocent" of the crimes of which they stand convicted. By the same token, although the government should have disclosed certain pieces of information back in 1985 that were arguably favorable to the accused, none of the undisclosed information was material under *Brady v. Maryland* because none of it — viewed separately or cumulatively — would have made any difference in the outcome of the trial. It is not enough to show that the defendants could have used the undisclosed evidence to construct a "counter-narrative" (or, as here, two counter-narratives that were mutually exclusive of each other), which could have been supported by a possible reconstruction of the physical evidence that ignores all of the eyewitness testimony. For evidence to be material under *Brady*, petitioners need to show a "reasonable probability" that the undisclosed evidence would have produced a different verdict. *See Strickler*, 527 U.S. at 281; *Heath v. United States*, 26 A.3d 266, 280 (D.C. 2011) ("[I]t must be reasonably probable (and not merely possible) that the jury would have harbored a reasonable doubt regarding the defendant's guilt if the evidence had not been suppressed."). Under that standard, based on the entire voluminous record in this case, petitioners' *Brady* claims, like their innocence claims, must fail.

For all of the foregoing reasons, it is this 6th day of August, 2012,

ORDERED that petitioner Yarborough's motion to vacate his convictions based on ineffective assistance of counsel, pursuant to D.C. Code § 23-1 10, be, and it hereby is, denied; and it is further

ORDERED that all petitioners' motions to vacate their convictions or, in the alternative, for a new trial, pursuant to D.C. Code § 22-4135, be, and they hereby are, denied; and it is further

ORDERED that all petitioners' motions to vacate their convictions or, in the alternative, for a new trial based on violations of *Brady v. Maryland*, 373 U.S. 83 (1963), pursuant to D.C. Code § 23-110, be, and they hereby are, denied.

/s/
JUDGE FREDERICK H. WEISBERG

SIGNED IN CHAMBERS

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
OCT 14 2016
OFFICE OF THE CLERK

Nos. 15-1503 and 15-1504

In the Supreme Court of the United States

CHARLES S. TURNER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

RUSSELL L. OVERTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly declined to consider a murder committed by another person seven years after petitioners' trial in determining whether the government withheld material exculpatory evidence in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963).

2. Whether the court of appeals correctly applied this Court's precedents in rejecting petitioners' *Brady* claim.

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In the Supreme Court of the United States

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v.

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RUSSELL L. OVERTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals (Pet. App. 1a-78a) is reported at 116 A.3d 894.[1] The opinion of the trial court (Pet. App. 81a-131a) is unreported. A prior opinion of the D.C. Court

[1] All citations to the Pet. App. are to the appendix to Petition No. 15-1503, filed by petitioners Clifton E. Yarborough, Christopher D. Turner, Kelvin D. Smith, Charles S. Turner, Levy Rouse, and Timothy Catlett. That petition is referred to in this brief as Joint Pet. The separate petition filed by petitioner Russell L. Overton, No. 15-1504, is cited as Overton Pet.

of Appeals in petitioners' case is reported at 545 A.2d 1202.

JURISDICTION

The judgment of the court of appeals was entered on June 11, 2015. A petition for rehearing was denied on January 14, 2016 (Pet. App. 79a-80a). On March 24, 2016, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 13, 2016. On April 27, 2016, the Chief Justice further extended the time within which to file a petition for a writ of certiorari to and including June 10, 2016, and the petitions were filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the Superior Court for the District of Columbia, petitioners were convicted of kidnapping, in violation of D.C. Code § 22-2101 (1981); armed robbery, in violation of D.C. Code §§ 22-2901 and 22-3202 (1981); and two counts of first-degree felony murder while armed, in violation of D.C. Code §§ 22-2401 and 22-3202 (1981). The trial court sentenced petitioners Timothy Catlett, Russell L. Overton, Charles S. Turner, Levy Rouse, Clifton E. Yarborough, and Kelvin D. Smith to 35 years to life imprisonment. The court sentenced petitioner Christopher Turner to 27-and-one-half years to life imprisonment. Gov't C.A. Br. 2. On appeal, the D.C. Court of Appeals held that petitioners' convictions for first-degree felony murder merged with their convictions for kidnapping and armed robbery and that petitioners could only be sentenced for one felony murder. 545 A.2d 1202, 1206, 1215, 1219, cert. denied, 488 U.S. 1017 (1989). On remand, the trial court resentenced

petitioners to the same amount of prison time. Gov't C.A. Br. 3.

In 2010, petitioners moved to vacate their convictions under D.C. Code § 23-110 (2001), and the Innocence Protection Act of 2004 (IPA), Pub. L. No. 108-405, Tit. IV, 118 Stat. 2278 (D.C. Code § 22-4135 (2001)). Following an evidentiary hearing, the trial court denied those motions. Pet. App. 81a-131a. The D.C. Court of Appeals affirmed. *Id.* at 1a-78a.

1. Shortly after 4:30 p.m. on October 1, 1984, Catherine Fuller left her home in Washington, D.C., to go shopping. Gov't C.A. Br. 3; see Pet. App. 4a-5a. Just after 6 p.m., Fuller's partially clad body was found in a garage off of an alley between 8th and 9th Streets, Northeast. She had died from massive blunt-force injuries. Gov't C.A. Br. 4-5, 14-15; see Pet. App. 4a.

A police investigation concluded that the crime had occurred as follows: On the afternoon of the murder, a large group of young people (including petitioners) congregated in a park south of H Street between 8th and 9th Streets, Northeast. Gov't C.A. Br. 3-6; see Pet. App. 4a-5a. Some members discussed "getting paid," *i.e.*, committing a robbery, and Calvin Alston suggested Fuller, who was walking across the street, as the victim. Gov't C.A. Br. 4, 7; see Pet. App. 5a. A group of assailants (including petitioners Levy Rouse and Charles Turner) followed Fuller to the entrance of an alley off of 8th Street while another group (including petitioners Kelvin Smith, Christopher Turner, Clifton Yarborough, and Russell Overton) circled around to the 9th Street entrance to the same alley. Gov't C.A. Br. 4, 7-8, 9 n.12; see Pet. App. 5a. Petitioner Charles Turner pushed Fuller into the alley, where he, Alston, Harry Derrick Bennett, petitioners

Christopher Turner, Rouse, Smith, and others punched and kicked her, and petitioner Rouse struck her on the head with a piece of wood. Gov't C.A. Br. 4, 8-9; see Pet. App. 5a. After Fuller fell to the ground, the group continued to hit and kick her and then carried her further into the alley near a garage. The assailants robbed Fuller of money and jewelry. Gov't C.A. Br. 9-11; see Pet. App. 5a. Eventually Fuller was dragged into the garage, where she was stripped nearly naked. Gov't C.A. Br. 4, 10; see Pet. App. 5a. While the group stood and watched, some members held Fuller's legs, and petitioner Rouse took a pipe-like object and shoved it approximately 10 to 11 inches up into Fuller's rectum. Gov't C.A. Br. 4, 10-11; see Pet. App. 5a. The group then dispersed. Gov't C.A. Br. 4, 12; see Pet. App. 5a. William Freeman, a street vendor, located Fuller's body when he walked through the alley around 6 p.m. Gov't C.A. Br. 13-14.

2. A grand jury returned an indictment charging petitioners and six others with kidnapping, in violation of D.C. Code § 22-2101 (1981); armed robbery, in violation of D.C. Code §§ 22-2901 and 22-3202 (1981); and two counts of first-degree felony murder while armed, in violation of D.C. Code §§ 22-2401 and 22-3202 (1981). Pet. App. 5a. At trial, cooperating co-defendants Alston and Bennett described the robbery plan and the attack on Fuller. Gov't C.A. Br. 5; see Pet. App. 5a-6a.[2] Melvin Montgomery described the events in the park, including the discussion about "getting paid" and the decision to target a woman passerby. Gov't C.A.

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[2] Alston pleaded guilty to second-degree murder. He was sentenced to 12 to 36 years of imprisonment. Bennett pleaded guilty to manslaughter and robbery. He was sentenced to 8 to 30 years of imprisonment. Gov't C.A. Br. 5 n.4.

Br. 5; see Pet. App. 7a. Juveniles Carrie Eleby and Linda Jacobs testified that they had watched a group of young men attack a woman in the alley and sodomize her with a pipe. Gov't C.A. Br. 12-13 n.21; see Pet. App. 6a. Maurice Thomas testified that, while walking home on 9th Street, he saw a group of people (some of whom he recognized) assault a woman. Gov't C.A. Br. 13 n.21; see Pet. App. 7a. Thomas further testified that, later that night, he overheard petitioner Timothy Catlett tell someone that they "had to kill [Mrs. Fuller] because she spotted someone Catlett was with." *Ibid.* The government introduced against petitioner Yarborough a videotaped statement in which he claimed to have witnessed a group rob, hit, and kick Fuller, and sodomize her with a pole. Gov't C.A. Br. 18; see Pet. App. 8a. Kaye Porter testified that she had asked petitioner Catlett why he "d[id] that to that lady," and Catlett replied that "[a]ll he did was kick her and somebody else stuck the pole up in her" because "she wasn't acting right." Gov't C.A. Br. 19; see Pet. App. 8a. Detective Daniel Villers testified that he overheard petitioner Christopher Turner tell petitioner Overton not to worry because they (Turner and Overton) did not touch the body and thus did not leave any fingerprints. The two men further discussed who "gave them up" and how the police knew that they and "everybody" were in the alley. *Ibid.*

Petitioners Overton, Rouse, Smith, Charles Turner, and Christopher Turner presented alibi defenses. Gov't C.A. Br. 20-32; see Pet. App. 8a-10a. During rebuttal, Catrina Ward testified that she saw blood splattered on petitioner Rouse's pants on the night of the murder. Pet. App. 10a. She also testified that Rouse told her in December 1984 that he "did the

worst thing to that lady in the alley." Gov't C.A. Br. 24 n.42; see Pet. App. 10a.

The jury convicted petitioners on all counts.[3] The trial court sentenced petitioners Catlett, Overton, Charles Turner, Rouse, Yarborough, and Smith to 35 years to life imprisonment. The court sentenced petitioner Christopher Turner to 27-and-one-half years to life imprisonment. Gov't C.A. Br. 2.

3. All petitioners except Charles Turner appealed. The D.C. Court of Appeals accepted the jury's verdicts but remanded for resentencing. 545 A.2d 1202, 1219. While noting some conflicting testimony about "exactly when each appellant joined in the beating," the court found "overwhelming evidence that each of them was involved at one time or another." *Id.* at 1206 n.2. The court held, however, that petitioners' convictions for first-degree felony murder merged with their convictions for kidnapping and armed robbery and that petitioners could only be sentenced for one felony murder. *Id.* at 1206, 1215, 1219. The court explained that this holding "would leave each appellant convicted of one count of felony murder and the noncorresponding felony." *Id.* at 1219. On remand, the trial court resentenced petitioners to the same amount of prison time. Gov't C.A. Br. 3.

4. In 2010, petitioners moved to vacate their convictions, or, in the alternative, for a new trial. They claimed that newly discovered evidence, including witness recantations and expert testimony, established

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[3] The jury acquitted Felicia Ruffin and Alphonzo Harris. Pet. App. 11a. James Campbell was granted a severance and later pleaded guilty to manslaughter and attempted robbery. *Id.* at 5a. Steven Webb, a co-defendant who was convicted at trial, died in prison. *Id.* at 83a n.3.

their actual innocence. Gov't C.A. Br. 33-34; see Pet. App. 2a. Petitioners also alleged that the government had failed to disclose material exculpatory information before trial, in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963), including information that:

- Ammie Davis had told a police officer that she had witnessed James Blue abduct and kill Fuller. Before petitioners' trial, Blue murdered Davis for unrelated reasons. Gov't C.A. Br. 46-48; see Pet. App. 21a-24a & n.17.
- A man whom Freeman had observed entering the alley after Freeman discovered Fuller's body and then fleeing when police arrived was nearby resident James McMillan. (Other witnesses confirmed Freeman's account.) Freeman saw McMillan concealing something under his coat. Gov't C.A. Br. 14 n.24, 49; see Pet. App. 17a-18a.[4] A few weeks after Fuller's murder, McMillan struck and robbed two women in the same area. Gov't C.A. Br. 49, 52; see Pet. App. 17a-18a. In 1992, after he was released from prison for those crimes, McMillan robbed, sodomized, and murdered a woman in an alley a few blocks away. Gov't C.A. Br. 49; see Pet. App. 18a-19a.
- When Jackie Watts and Willie Luchie walked through the alley between 5:30 p.m. and 5:45 p.m., they heard

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[4] Although Freeman testified at trial about observing this man and a companion in the alley, the government did not disclose their identities before trial and no defense attorney asked Freeman who the two men were. Gov't C.A. Br. 50-51. After the trial judge declined to order the government to disclose the identities of the individuals Freeman had observed in the alley, defense counsel stated they would simply call Freeman as a defense witness, but the defense did not do so. Pet. App. 123a n.22. The judge's ruling was not challenged on appeal. *Ibid.*

a moan or groan coming from inside the garage. Gov't C.A. Br. 56-57, 99; see Pet. App. 16a. Luchie also recalled that both doors of the garage were closed. Gov't C.A. Br. 57; see Pet. App. 16a.

- Porter had falsely told police that she was present when Alston confessed to Eleby about robbing Fuller. Porter later admitted that she had lied about overhearing such a conversation at Eleby's request. Gov't C.A. Br. 61; see Pet. App. 22a.
- Although Thomas claimed to have told his Aunt Barbara about witnessing the attack on the day it occurred, Aunt Barbara told police she did not recall this conversation. Gov't C.A. Br. 62-63 & n.98; see Pet. App. 23a.

After a 16-day evidentiary hearing in 2012, the trial court denied petitioners' motions. Pet. App. 81a-131a.[5] The court rejected petitioner Yarborough's ineffective assistance of counsel claim relating to his videotaped statement, *id.* at 86a-101a;[6] and petitioners' claims of innocence under the IPA, *id.* at 101a-111a. With re-

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[5] The post-trial motions were heard by a judge different from the judge who presided at the original trial. See Gov't C.A. Br. 1-2, *United States* v. *Catlett, et al.* (D.C. Court of Appeals Nos. 86-208, 86-295, 86-315, 86-392, 86-393, 86-421, 86-505, filed June 24, 1987) (Judge Robert M. Scott presided over the trial).

[6] Although Yarborough claimed that his statement resulted from physical assaults by the police, the trial court found that it was "the voluntary admission of a conniving youthful offender trying to distance himself as far as possible from the crime." Pet. App. 98a-101a (deeming Yarborough's claims of police abuse "patently incredible"); see *id.* at 100a (noting that the trial court in 1985 had found Yarborough's waiver of *Miranda* rights and ensuing statement to be entirely voluntary).

spect to the latter, the court concluded that petitioners had not "come close to demonstrating actual innocence," *id.* at 110a, and that "the totality of evidence pointing to [their] guilt * * * remains * * * 'overwhelming,'" *id.* at 129a.

The trial court further rejected petitioners' *Brady* claims. Pet. App. 112a-129a. "To make out a claim under [*Brady*]," the court explained, "petitioners must establish three elements: (1) the information not disclosed must be 'favorable' to the defendant, (2) the information must have been suppressed or withheld by the prosecution, and (3) the information must be 'material' to guilt or punishment." *Id.* at 113a-114a (quoting *Strickler* v. *Greene*, 527 U.S. 263, 281-282 (1999)). The court explained that "evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Id.* at 114a (quoting *United States* v. *Bagley*, 473 U.S. 667, 682 (1985)). The court further explained that "[m]ateriality is shown if, in the context of the entire case, the non-disclosure undermines the court's confidence in the outcome of the trial." *Ibid.* (citing *Kyles* v. *Whitley*, 514 U.S. 419, 434-437 (1995)).

The trial court concluded that "none of the undisclosed information was material under *Brady*." Pet. App. 130a. The court found that the information suggesting that either Blue or McMillian had murdered Fuller was not material. *Id.* at 117a-124a. As for Blue, Davis's claim that she saw Blue commit the crime "was thoroughly discredited," would have "almost certainly [been] inadmissible" because Davis died before petitioners' trial, and would have been rejected by the jury in any event. *Id.* at 117a-120a &

n.18 (noting, *inter alia*, that Davis had previously made a different "false and vindictive accusation" of murder against Blue and "[n]ot one of the approximately 400 other witnesses interviewed * * * mentioned [Blue] as a possible perpetrator"). With respect to McMillan, the court found that the undisclosed information was "definitely not material" because no witness put McMillan in the alley during the attack and, assuming he was present, "[h]e could have been a participant with these petitioners or one of the many bystanders." *Id.* at 123a; see *id.* at 124a (the theory that McMillian "committed the crime * * * to the exclusion of the petitioners * * * flies in the face of all the evidence").

With respect to the potential impeachment information, the trial court concluded that "[n]one of these non-disclosures, separately or together, is material under *Brady*." Pet. App. 124a; see *id.* at 124a-129a. Porter's admission that she lied at Eleby's request was not material because "Porter was a relatively minor witness against one defendant [Catlett], and the cross examination of Eleby about other lies and inconsistent statements * * * was very extensive." *Id.* at 125a; see *id.* at 125a n.23 (jury was already told Eleby's testimony "should be received with caution and scrutinized with care"). And Aunt Barbara's failure to recall Thomas telling her that he had witnessed an assault was not material because Thomas had testified that Aunt Barbara had told him to "forget" what he had seen, and even if Thomas had been impeached with her statement, "no juror would have concluded that [Thomas] was making it all up." *Id.* at 126a.

5. The D.C. Court of Appeals affirmed. Pet. App. 1a-78a. Applying *de novo* review, *id.* at 29a-31a, the

court agreed that any information not disclosed before trial was not material under *Brady*, *id.* at 31a-54a. The court emphasized that "[m]ateriality is 'not a sufficiency of the evidence test'" and that "*Brady* materiality must be assessed in terms of the cumulative effect of all suppressed evidence favorable to the defense." *Id.* at 28a (quoting *Kyles*, 514 U.S. at 434).

The D.C. Court of Appeals analyzed the undisclosed information on an "item-by-item basis," Pet. App. 31a, and concluded that some information "adds little to any cumulative materiality analysis," *id.* at 47a. In particular, it found that Davis's accusations against Blue would not have been admissible for their truth at trial, nor had petitioners shown any reasonable probability that they would have led to the discovery of other admissible evidence. *Id.* at 37a-45a. Further, if admitted to show that the government's investigation was not diligent, the impact would have been "negligible" because the investigation was "quite a thorough one overall." *Id.* at 43a-44a.

The D.C. Court of Appeals placed all of the undisclosed impeachment evidence in the same category. Pet. App. 45a, 47a. Although Porter's false claim about hearing Alston confess to Eleby could have been used to impeach her testimony at trial (that petitioner Catlett admitted kicking Fuller), that testimony was already impeached with Porter's contrary grand jury testimony, and the other evidence against Catlett was very strong. *Id.* at 46a (summarizing evidence). Likewise, with respect to Eleby, "additional impeachment [of her] would [not] have made a difference to the jury's assessment of [her] credibility." *Ibid.* Furthermore, Aunt Barbara's failure to recall Thomas having told her about the attack on Fuller "was unlikely to

have discredited Thomas in any significant way," because, *inter alia*, having urged Thomas not to report the assault, Aunt Barbara had "every reason to deny their conversation when she spoke to the police." *Id.* at 47a.

The D.C. Court of Appeals found that the Watts/Luchie statements and the McMillan information did have "potential weight in a cumulative materiality analysis." Pet. App. 31a-32a. The court noted that information McMillan had robbed two women after Fuller's murder was potentially admissible at trial and relevant. *Id.* at 36a. The court "reach[ed] a different conclusion," however, as to the murder committed by McMillan in 1992. *Id.* at 36a-37a. The court held that "[a] *Brady* violation cannot be predicated on the government's failure to * * * disclose evidence that does not yet exist" and, therefore, that the 1992 murder "ha[d] no bearing on the question of the materiality of any evidence that the government actually did withhold." *Id.* at 36a. While "other procedures" existed to decide claims based on "new evidence," the court observed, *Brady* provided the "'wrong framework.'" *Id.* at 37a (quoting *District Attorney's Office for the Third Judicial Dist.* v. *Osborne*, 557 U.S. 52, 69 (2009)).

The D.C. Court of Appeals addressed "the cumulative materiality" of the undisclosed evidence, focusing primarily on petitioners' claim that the Watts/Luchie statements and the McMillan information "would have enabled them to present an alternative single-perpetrator theory of the crime." Pet. App. 48a; see *id.* at 48a-54a. The court emphasized the strength of the government's evidence, observing that several eyewitnesses, including two participants who pleaded

guilty to homicide, had implicated petitioners in a group attack, and that their testimony was corroborated by admissions some petitioners had made. *Id.* at 48a-52a. Moreover, no trial witness had disputed this "overall description of how the crime was committed." *Id.* at 49a. Although the government's evidence had certain weaknesses (*i.e.*, problems with witness consistency and credibility, and a lack of physical evidence), the court concluded that the Watts/Luchie statements and the McMillan information "did not take advantage" of these weaknesses because it did not "contradict the government witnesses' accounts, demonstrate their bias, or incorporate contrary forensic evidence." *Ibid.*

The D.C. Court of Appeals further concluded that the Watts/Luchie statements and the McMillan information failed to "provide substantial support" for "any theory that excluded [petitioners] as the perpetrators." Pet. App. 50a. That Watts and Luchie heard groans (but did not see any activity or hear anything else) did not prove that the assault was still occurring at 5:30 p.m. and was "entirely consistent" with the government's evidence. *Ibid.* As for Luchie's observation that both doors of the garage were closed shortly before Freeman found one open, that claim "surely would not have been enough to turn a jury that found the government's witnesses credible, as this jury did," given other possible explanations for the discrepancy. *Ibid.*

With respect to the McMillan information, the D.C. Court of Appeals concluded that it "perhaps could have led the jury to suspect that he participated in the attack on Fuller," or, alternatively, that he arrived on the scene after Watts and Luchie had left and that he

looked in the garage, leaving a door open. Pet. App. 50a-51a. But the court concluded that the jury would have had no substantial reason to believe that McMillan "was the *sole* perpetrator * * * or that he was one of only a few assailants." *Id.* at 51a. Instead, "McMillan simply could have been another member of [the large] group," as witness Christopher Taylor had alleged to police. *Ibid.*

The D.C. Court of Appeals concluded that a theory that McMillan committed the crime alone (or with one or two others) would have been "exceedingly implausible and difficult for the jury to accept." Pet. App. 51a-52a. In addition to "the dearth of any evidence inculpating [McMillan]," such a theory would have required the jury to conclude that "all the government witnesses were lying or mistaken about every defendant at trial"; and that Alston and Bennett had either pleaded guilty to homicide while innocent, or admitted their own culpability while inexplicably shielding their collaborator McMillan. *Id.* at 50a-51a. The court clarified that its "conclusion [wa]s the same for each [petitioner] individually." *Id.* at 52a.

The D.C. Court of Appeals distinguished *Kyles*, *supra*, as a case where the parties had agreed on how the crime occurred, disputing only the identity of the perpetrator, and the government suppressed substantial evidence supporting the defense theory. Pet. App. 53a & n.83 (citing *Kyles*, 514 U.S. at 441-449). Here, however, "the undisclosed evidence * * * would not have directly contradicted the government's witnesses or shown them to be lying, and it did not tend to show that any given [petitioner] was misidentified. Rather, what is at issue is the basic structure of how the crime occurred." *Id.* at 53a-54a. In the court's view, those

observations "make[] the burden on [petitioners] to show materiality quite difficult to overcome, because it requires a reasonable probability that the withheld evidence (in its entirety, and however [petitioners] would have developed it) would have led the jury to doubt *virtually everything* that the government's eyewitnesses said about the crime." *Id.* at 54a. After distinguishing cases where the government withheld evidence that the police had coerced confessions or credible evidence directly contradicting eyewitness accounts, the court concluded that "the sum of the undisclosed evidence did not rise to that level of significance" and that petitioners did not demonstrate a reasonable probability that, "even if all [of the] evidence had been disclosed in a timely and appropriate fashion," the result of the trial would have been different. *Id.* at 54a.[7]

ARGUMENT

Joint petitioners contend (Joint Pet. 16-20) that the D.C. Court of Appeals should have considered McMillan's 1992 murder of another woman in deciding whether the government withheld material exculpatory information before their 1985 trial. The court of appeals correctly rejected that argument and its decision does not conflict with any decision of this Court, a federal court of appeals, or another state court of last resort. Petitioners further contend (Joint Pet. 20-28; Overton Pet. 15-30) that the D.C. Court of Appeals

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[7] The D.C. Court of Appeals further concluded that the trial court did not abuse its discretion in denying petitioners' claims of actual innocence under the IPA, Pet. App. 54a-62a, and that Yarborough's counsel did not render ineffective assistance in moving to suppress his videotaped statement, *id.* at 62a-78a.

departed from this Court's precedents applying *Brady* v. *Maryland*, 373 U.S. 83 (1963), in rejecting their *Brady* claim. The D.C. Court of Appeals correctly applied this Court's precedents and petitioners' disagreements with the court's analysis do not present any issue worthy of this Court's review. Accordingly, the petition for a writ of certiorari should be denied.

1. A prosecutor's constitutional duty of disclosure stems primarily from the Supreme Court's decisions in *Brady* and *Giglio* v. *United States*, 405 U.S. 150 (1972). In those cases, the Court held that the government has a constitutional duty to disclose favorable evidence to the accused where such evidence is "material" either to guilt or to punishment, *Brady*, 373 U.S. at 87, and that favorable evidence includes not only evidence that tends to exculpate the accused, but also evidence that is useful to impeach the credibility of a government witness, *Giglio*, 405 U.S. at 154. See *Smith* v. *Cain*, 132 S. Ct. 627, 630 (2012). In subsequent decisions, the Court has explained that evidence is material if there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States* v. *Bagley*, 473 U.S. 667, 682 (1985); see *Cone* v. *Bell*, 556 U.S. 449, 469-470 (2009). As the Court further explained in *Kyles* v. *Whitley*, 514 U.S. 419 (1995), undisclosed evidence is material only if it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 435.

a. Joint petitioners contend (Joint Pet. 16-20) that the D.C. Court of Appeals should have considered McMillan's 1992 murder of another woman as part of its materiality analysis. See Innocence Network Ami-

cus Br. 17-25; Former Prosecutors Amicus Br. 15-18. The court correctly rejected that argument. *Brady* claims involve "the discovery, after trial of information *which had been known to the prosecution* but unknown to the defense." *United States* v. *Agurs*, 427 U.S. 97, 103 (1976) (emphasis added). Because the 1992 murder had not yet occurred at the time of petitioners' trial, it was not "know[n] to the prosecution" and thus could not constitute material undisclosed information under *Brady*. See, *e.g.*, *United States* v. *Diaz*, 176 F.3d 52, 107, 109 (2d Cir.) (government did not suppress evidence of events occurring after trial), cert. denied, 528 U.S. 875 and 528 U.S. 957 (1999). As the court below explained, "[a] *Brady* violation cannot be predicated on the government's failure to do the impossible and disclose evidence that does not yet exist." Pet. App. 36a.

Nor does the 1992 murder shed useful light on the materiality of other information not provided to the defense before trial, including McMillan's identity as one of the men who appeared in the alley after the murder and his subsequent assaults on two women. Joint petitioners suggest (Joint Pet. 19) that the 1992 murder tends to prove that, had the government disclosed what it knew about McMillan in 1984, the defense "could have investigated [him] and uncovered and introduced evidence relating to his propensity towards sexual violence and sodomy." But the information the government possessed in 1985 did not suggest that McMillan had a propensity towards sexual violence and sodomy, nor have petitioners identified any other such evidence they might have uncovered before their trial. "[M]ere speculation" about the existence of exculpatory evidence cannot sustain a

valid *Brady* claim. *Wood* v. *Bartholomew*, 516 U.S. 1, 6 (1995) (per curiam). Joint petitioners likewise contend (Joint Pet. 19) that McMillan's 1992 crime shows that he could have murdered Fuller "without the participation of a large group." But there was never any question that a large group was not *necessary* to attack, sodomize, and murder a middle-aged woman who was 4' 11" and weighed 99 pounds. See Gov't C.A. Br. 9, *United States* v. *Catlett, et al.* (D.C. Court of Appeals Nos. 86-208, 86-295, 86-315, 86-392, 86-393, 86-421, 86-505, filed June 24, 1987).

b. Joint petitioners contend (Joint Pet. 16-17) that the decision below "deepens a conflict * * * concerning whether post-trial information can shed light on the materiality of suppressed evidence." Contrary to petitioners' claim (*id.* at 18-19), the D.C. Court of Appeals did not "adopt[] a categorical rule that post-trial events and evidence" can never shed light on the materiality of suppressed evidence under *Brady*. Instead, the court held that a defendant does not raise a *Brady* claim when he asserts that "new, previously unobtainable evidence not kept from the defendant might lead to a different result in a new trial." Pet. App. 36a-37a. That holding is unremarkable. See, *e.g.*, *Apanovitch* v. *Bobby*, 648 F.3d 434, 437 (6th Cir. 2011) ("[n]ew, non-*Brady*, evidence is enlightening as to whether a petitioner is—seen as of now—actually innocent" but is not relevant to the *Brady* inquiry), cert. denied, 132 S. Ct. 1742 (2012).

The D.C. Court of Appeals' holding does not conflict (see Joint Pet. 17) with *Leka* v. *Portuondo*, 257 F.3d 89 (2d Cir. 2001), which involved a fundamentally different use of post-trial information. Leka was convicted of murder based on the testimony of two eye-

witnesses, after the prosecution failed to disclose a police officer's differing account of the crime. *Id.* at 90-95, 104. When confronted with the officer's account after trial, the two eyewitnesses recanted. *Id.* at 106. The Second Circuit considered those recantations in its materiality analysis because they demonstrated the "seismic impact" that the officer's testimony would have had at trial. *Id.* at 106-107 (officer's account rendered other eyewitness testimony "untenable"). Unlike the arguments petitioners advance here, that particular use of "post-trial information" comports with *Brady*'s materiality inquiry because it focuses on how the trial would have unfolded if the government had disclosed known favorable information to the defense. See, *e.g.*, *Wood*, 516 U.S. at 7 (relying on defense counsel's admission that withheld polygraph results "would not have affected" witness's cross-examination at trial, as well as post-trial cross-examination of the same witness using the polygraph results that "obtained no contradictions or admissions"); *Kyles*, 514 U.S. at 448 (post-trial statements by prosecutor and detective "confirm[]" that undisclosed witness statement might have supported claim that evidence was planted at the scene).

State ex rel. Griffin v. *Denney*, 347 S.W.3d 73 (Mo. 2011), cert. denied, 132 S. Ct. 1859 (2012), and *State ex rel. Woodworth* v. *Denney*, 396 S.W.3d 330 (Mo. 2013), also do not conflict with the opinion in this case. As joint petitioners note (Joint Pet. 17-19), those cases evaluated the materiality of evidence withheld before trial in conjunction with other evidence that subsequently came to light. *Griffin*, 347 S.W.3d at 77 ("When reviewing a habeas petition premised on an alleged *Brady* violation, this Court considers all available

evidence uncovered following the trial."); *Woodworth*, 396 S.W.3d at 345 (same). Neither case, however, held that *Brady* dictated that approach. To the contrary, *Griffin* cited *State ex rel. Engel* v. *Dormire*, 304 S.W.3d 120, 126 (Mo. 2010), which considered evidence discovered after trial as a matter of state habeas corpus practice. *Griffin*, 347 S.W.3d at 77.[8] Accordingly, no clear dispute exists between Missouri and the District of Columbia over the meaning of federal constitutional law.

2. Petitioners contend (Overton Pet. 14) that the D.C. Court of Appeals failed to correct a *Brady* violation in a manner "irreconcilable with this Court's *Brady* precedents." See Joint Pet. 4 (decision is "flatly inconsistent with *Kyles* and other decisions of this Court"); *id.* at 16 (same). Petitioners claim that the D.C. Court of Appeals (1) wrongly held that, under *Brady*, "withheld evidence must call into question the testimony of all prosecution witnesses," *id.* at 16, 25-28; Overton Pet. 14-20; (2) improperly speculated about why a jury could have disregarded the undisclosed information, Joint Pet. 22-23; Overton Pet. 18-20; and (3) committed other errors, including failing to consider the cumulative effect of the information withheld, Joint Pet. 21, 23-24; Overton Pet. 30. Those contentions lack merit. The D.C. Court of Appeals correctly applied this Court's *Brady* precedents, and

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[8] *Griffin* also cited *Kyles*, 514 U.S. at 436-437, for the proposition that "courts must consider the cumulative effect of excluded evidence." 347 S.W.3d at 77. Its use of a "see also" signal, however, tacitly acknowledged that cumulating all evidence the government withheld before trial is not equivalent to cumulating withheld evidence with evidence discovered later.

the court's factbound conclusions do not warrant review by this Court.

a. Petitioners acknowledge that the D.C. Court of Appeals correctly identified and stated *Brady*'s materiality standard. See Joint Pet. 22 (court "inton[ed] the proper standards"); Overton Pet. 17 (court "recited many of these well-settled constitutional principles"). Contrary to their contentions, the court also carefully and correctly applied those principles from *Brady* in evaluating the materiality of the undisclosed information.

Contrary to petitioners' claim (Joint Pet. 25-26; Overton Pet. 3, 14), the D.C. Court of Appeals did not hold that, under *Brady*, material exculpatory evidence must contradict all of the government's evidence at trial. Rather, the court recognized that undisclosed information can undermine portions of the government's case. Pet. App. 49a, 54a (providing examples). The court concluded, however, that the Watts/Luchie statements and the McMillan information lacked that potential because they "would not have directly contradicted the government's witnesses or shown them to be lying, and did not tend to show that any given [petitioner] was misidentified." *Id.* at 53a. Instead, that evidence would have assisted the defense only in challenging "the basic structure of how the crime occurred," *i.e.*, the theory of a large group attack. *Id.* at 54a. Because all the eyewitnesses had described such an attack, the undisclosed information could have given rise to reasonable probability of a different outcome only if it "would have led the jury to doubt *virtually everything* that the government's eyewitnesses said about the crime." *Ibid.*

That analysis, which addressed the exculpatory potential of particular information in the context of petitioners' trial, did not deviate from the "materiality standard" or "distort[ ] * * * this Court's *Brady* materiality jurisprudence." Overton Pet. 15, 18. Instead, it represented the only logical way in which the undisclosed evidence could have undermined confidence in the outcome of the trial. While petitioners criticize the D.C. Court of Appeals' opinion, they fail to identify any subset of the eyewitnesses to the crime whose testimony was consistent with a single perpetrator or small group theory. Accordingly, petitioners provide no factual basis for disputing the court's assessment that their alternative theories do in fact conflict with "*virtually everything* that the government's eyewitnesses said about the crime." Pet. App. 54a.

Because the D.C. Court of Appeals did not hold that, to be material, exculpatory evidence must necessarily contradict all eyewitness testimony, its opinion does not conflict with *Kyles*. See Overton Pet. 17-18. In *Kyles*, prosecutors withheld prior inconsistent statements from some of its eyewitnesses that would have "substantially reduced or destroyed" the value of their testimony. 514 U.S. at 441-445. This Court found those statements, combined with other withheld exculpatory evidence, to be material. *Id.* at 454. This case is not analogous because the Watts/Luchie statements and the McMillan information did not cast any doubt upon the testimony of any particular eyewitness. Pet. App. 53a-54a. Rather, it (weakly) would have suggested an alternative-perpetrator theory (while also remaining consistent with the government's evidence on the nature of the crime). *Id.* at

50a. Nor does this case resemble *Smith*, where a witness's undisclosed prior statements suggesting that he could not identify any of the perpetrators undermined "the *only* evidence [at trial] linking [the defendant] to the crime." 132 S. Ct. at 630.

b. Petitioners contend (Joint Pet. 26) that when "[e]vidence of a credible alternative perpetrator" is withheld, a new trial will "practically always" be required. See Overton Pet. 25 ("[A]lternative-perpetrator evidence is quintessential *Brady* material."); see also Innocence Network Amicus Br. 12-15; Former Prosecutors Amicus Br. 7-9. Regardless of whether that is true, McMillan was not a "credible alternative" perpetrator in this case.[9] Given the lack of evidence placing McMillan in the alley during the crime and the "overwhelming evidence" of a large group attack, blaming McMillan (or McMillan and one or two co-conspirators) "would have been exceedingly implausible and difficult for the jury to accept." Pet. App. 51a. Under similar circumstances, courts have found evidence implicating a third party not material. See, *e.g.*, *Hammond* v. *Hall*, 586 F.3d 1289, 1317-1319 (11th Cir. 2009) (withheld evidence of alternative perpetrators, including a serial killer who confessed to the crime and the victim's boyfriend, did not require new trial), cert. denied, 562 U.S. 1145 (2011); *United States* v. *Perez*, 280 F.3d 318, 350 (3d Cir.) (undisclosed statement of

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[9] As both lower courts explained, Blue was also not a "credible alternative perpetrator." See Pet. App. 37a-45a, 117a-120a & n.18; see also Gov't C.A. Br. 46-48, 87-91. Overton's suggestion that Davis's claims might have led to the discovery of admissible evidence pointing to Blue is unsupported by the record. See Gov't C.A. Br. 47, 87 (noting that the government's effort to locate a witness who could corroborate Davis's claims was fruitless).

co-conspirator inculpating someone other than defendant not material) (citing additional cases), cert. denied, 537 U.S. 859 (2002); *United States* v. *Zuno-Acre*, 44 F.3d 1420, 1426-1430 (9th Cir.) (undisclosed evidence suggesting that murder was instigated by victim's romantic rival, while exculpatory as to defendant, was not material in light of other evidence at trial), cert. denied, 516 U.S. 945 (1995); see also *Evans* v. *Nevada*, 28 P.3d 498, 510 (Nev. 2001) (to undermine confidence in trial's outcome, undisclosed information must not only link others to the crime but exclude defendant); see generally *Canales* v. *Stephens*, 765 F.3d 551, 575-576 (5th Cir. 2014) ("there is not a *Brady* violation every time the government does not disclose an alternative suspect, especially when the other suspect was not a particularly plausible one").

c. Petitioners err in suggesting (Joint Pet. 22; see Overton Pet. 15, 17, 20) that the D.C. Court of Appeals employed "sufficiency-of-the-evidence" review in lieu of a *Brady* materiality analysis. See also Former Prosecutors Amicus Br. 9-13. The court neither endorsed nor applied sufficiency of the evidence review. See, *e.g.*, Pet. App. 28a ("Materiality is 'not a sufficiency of the evidence test.'") (citing *Kyles*, 514 U.S. at 434). Instead, it applied this Court's materiality test under *Brady* and rejected petitioners' claim because "even if all [of the undisclosed evidence] had been disclosed in a timely and appropriate fashion, [petitioners] have not demonstrated a reasonable probability that the result of their trial would have been different." *Id.* at 54a; see *ibid.* ("The withheld evidence cannot reasonably be taken to put the whole case in such a different light as to undermine confi-

dence in the verdict.") (citation and internal quotation marks omitted).

d. Petitioners contend (Joint Pet. 2-23; Overton Pet. 18-20) that the D.C. Court of Appeals erred by speculating about how a jury might have viewed certain information. See Former Prosecutors Amicus Br. 13-14. That argument misapprehends materiality analysis. Because *Brady* asks whether there is a "reasonable probability" that withheld evidence would have affected the verdict, *Strickler* v. *Greene*, 527 U.S. 263, 281 (1999), some hypothesizing is inevitable. See, *e.g.*, *id.* at 294 (concluding, after a review of the record, that "petitioner would have been convicted * * * even if [a critical eyewitness] had been severely impeached [with withheld evidence]"). Moreover, while *Wearry* v. *Cain*, 136 S. Ct. 1002, 1007 (2016) (per curiam), and *Smith*, 132 S. Ct. at 630, criticized lower courts for "emphasiz[ing] reasons a juror might disregard new evidence while ignoring reasons she might not," *Wearry*, 136 S. Ct. at 1006-1007; see *Smith*, 132 U.S. at 630, the Court has elsewhere stressed that "[t]he mere possibility that an item of undisclosed information might have * * * affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *Agurs*, 427 U.S. at 109-110; see also *Kyles*, 514 U.S. at 437 ("[S]howing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation, without more."). Accordingly, in deciding a *Brady* claim, courts must evaluate the "reasonable probability" of a different outcome—the probative potential of undisclosed information at trial—which is precisely what the court did here.

Petitioners nevertheless contend (Joint Pet. 23) that the D.C. Court of Appeals engaged in "wild hypothesizing" to "explain away exculpatory evidence." See *id.* at 22 (opinion is "rife with speculation"); Overton Pet. 19-20. That factbound attack on the lower court's materiality analysis does not warrant this Court's review. In any event, the court correctly rejected as implausible petitioners' theories about how the Luchie/Watts statements and the McMillan information might have influenced the jury.

As for the former, the D.C. Court of Appeals correctly noted that a groaning sound coming from the garage (unaccompanied by any other activity or noise) does not tend to prove that the assault was still in progress when Luchie and Watts passed by. Pet. App. 50a. Further, that Luchie recalled both doors of the garage being closed, while Freeman testified that one was open when he found the body around 6 p.m., would have provided minimal support to a single perpetrator theory. The court identified two plausible explanations for this discrepancy (*i.e.*, Luchie was mistaken, or someone else later opened the door, *ibid.*), and several more exist,[10] so it was exceedingly unlikely that the jury would have rejected overwhelming eyewitness testimony—including from two participants in the crime—about a large group attack based on such a minor inconsistency. See *id.* at 52a n.82

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[10] Additional possibilities include that Luchie was lying, that Freeman was either mistaken or lying, that a partially opened door was perceived as open by one witness and closed by another, or that, after Luchie and Watts had passed through, one of the petitioners returned to the garage to search for valuables and then departed.

(Watts/Luchie evidence provided "slight support at most" to lone perpetrator or small group theories).

As for the McMillan evidence, the D.C. Court of Appeals noted the possibility that McMillan might have visited the garage after Luchie and Watts departed, and, further, that he might have entered it or carried something away. Pet. App. 50a-51a & n.81; see Joint Pet. 22-23. But contrary to petitioners' claims (Joint Pet. 22-23; Overton Br. 19), the court did not reject their *Brady* claim because the jury "might have suspected" such events. Pet. App. 50a. Instead, the court found the McMillan information not material because, even if it would have cast some suspicion on McMillan, the jury "would have had no substantial reason to suspect McMillan was the *sole* perpetrator" or "one of only a few assailants," rather than "another member" of petitioners' group. *Id.* at 51a. Petitioners provide no basis to question that reasoning, which comports with this Court's analysis in *Strickler*. See 527 U.S. at 292 ("the strong evidence that Henderson was a killer is entirely consistent with the conclusion that petitioner was also an actual participant in the killing").

3. Petitioners raise a number of additional challenges to the D.C. Court of Appeals' resolution of their *Brady* claim. Each challenge lacks merit and none presents an important legal issue worthy of certiorari review.

Petitioners contend (Joint Pet. 23) that the D.C. Court of Appeals "failed to meaningfully engage in a cumulative analysis of the withheld evidence in the context of the existing record." See *id.* at 8, 21, 23-25; see Overton Pet. 30. In fact, the court considered the cumulative effect of all the withheld evidence on peti-

tioners' trial. See, *e.g.*, Pet. App. 28a ("*Brady* materiality must be assessed in terms of the cumulative effect of all suppressed evidence favorable to the defense"); *id.* at 31a (undisclosed evidence will be discussed "first on an item-by-item basis, and then cumulatively"); *id.* at 48a-54a (section entitled "Cumulative Materiality of the Undisclosed Evidence").

Petitioners also suggest (Joint Pet. 24) that their convictions should have been reversed because "the case was a weak one" that "easily could have gone the other way." See Innocence Network Amicus Br. 15-17. To the contrary, three appellate judges and a trial judge (who did not handle the original proceeding) have found the evidence against petitioners at trial "overwhelming," and petitioners offer no supported reason to question that assessment. 545 A.2d at 1206 n.2; Pet. App. 129a.[11]

Petitioners contend (Joint Pet. 25; Overton Pet. 28) that withheld evidence deprived them of any opportunity to argue that no group attack occurred at all. That is incorrect. Evidence about McMillan's presence in the alley was admitted at trial and petitioners could have fingered him as an alternative perpetrator without knowing his name. See Gov't C.A. Br. 94-95. Petitioners also could have called Freeman as a wit-

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[11] Petitioners rely on a reporter's notes of a 1997 interview with the lead prosecutor to claim that the trial evidence was weak. Joint Pet. 8 (citing Joint C.A. Br. 61 (citing C.A. App. 1734, 1751)); *id.* at 24; Overton Pet. 3, 23. In fact, those notes are consistent with the lower courts' assessment. C.A. App. 1734, 1758 (prosecutor notes that while the case seemed "[n]ot a good one" at times during the investigation, "[i]t ended up being a much stronger case" at trial). Nor does the length of deliberations show any deficit of proof given the jury's need to individually assess the culpability of ten defendants.

ness and asked him to identify the individuals he saw in the alley, but they declined to do so. See note 4, *supra*. In addition, petitioners also could have advanced a "far more plausible" "small group" theory that "Alston and Bennett were the sole perpetrators." Pet. App. 52a n.82. Petitioners likewise contend (Joint Pet. 25) that "objective, crime-scene evidence," principally the size of the garage, proves that an attack by a large group would have been impossible. See Overton Pet. 28. Although its merit is doubtful, see Gov't C.A. Br. 102 (noting that most of the beating was inflicted on Fuller outside the garage); see also Pet. App. 110a-112a n.14 (finding that petitioners' "scientific evidence" that Fuller was assaulted by one to three people was neither "newly discovered" nor "particularly persuasive" and did not "begin to demonstrate that the petitioners are 'actually innocent'") (citation omitted), nothing prevented petitioners from raising that theory at trial.[12]

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[12] Without renewing their claims of innocence, petitioners contend (Joint Pet. 13; see Overton Pet. 13) that Alston, Bennett, Jacobs, and Montgomery all "took the stand [at the post-trial hearing] and recanted their trial testimony." Although Alston and Bennett recanted, the trial court found that their recantations and testimony that they were not present during the crime was "nothing short of preposterous." Pet. App. 102a-104a. The trial court further concluded that Jacobs's hearing testimony was "relatively useless" because, *inter alia*, "whenever she was asked [at the hearing] if she saw any of the attack or the act of sodomy against [Fuller], [Jacobs] broke down sobbing just the way she did when she was confronted with that visual image at trial." *Id.* at 107a. Montgomery did not recant. *Id.* at 108a-109a, 129a (stating that Montgomery's hearing testimony "actually supported the government"). Further, Thomas, an important eyewitness with "no apparent bias or motive to fabricate," has never recanted. See *id.* at 126a.

Noting that the jury's deliberations over his guilt were protracted, Overton contends (Overton Pet. 30) that "almost *any* additional evidence favorable to the defense might have tipped the balance" in his particular case. The D.C. Court of Appeals rejected that claim because, although the evidence against Overton was "in some ways * * * weaker" than the evidence against others, Overton is "similarly situated" to the others with respect to the chief exculpatory potential of the undisclosed information, *i.e.*, the single perpetrator defense, and that undisclosed evidence "had no bearing on whether any one individual defendant was part of a large group attack." Pet. App. 52a-53a. That factbound conclusion does not merit further review.

Overton also contends (Overton Pet. 29-30) that additional impeachment of Eleby with information that she had encouraged Porter to lie might have made a difference in his case. He identifies no reason, however, why this Court should question the lower courts' factbound conclusion that further impeachment of Eleby would have been unproductive. Pet. App. 46a, 125a.

4. Finally, petitioners suggest (Joint Pet. 28; Overton Pet. 33-35) that this Court may wish to consider summarily reversing the decision below. No basis for summary reversal exists because the D.C. Court of Appeals, after a careful and detailed review of the trial evidence, correctly adhered to this Court's *Brady* precedents.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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RECORD AND BRIEFS

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In the Supreme Court of the United States

CHARLES S. TURNER, CLIFTON E. YARBOROUGH, CHRISTOPHER D. TURNER, KELVIN D. SMITH, LEVY ROUSE, & TIMOTHY CATLETT,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

REPLY BRIEF FOR THE PETITIONERS

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In the Supreme Court of the United States

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PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

REPLY BRIEF FOR THE PETITIONERS

The government does not dispute that the federal courts of appeals and state courts of last resort are split on the question whether post-trial information has any bearing on the materiality inquiry under *Brady* v. *Maryland*, 373 U.S. 83 (1963). That split is plainly implicated by this case, where post-trial information starkly reveals the materiality of the government's withholding of James McMillan's presence at the crime scene.

On the second question presented, the government attempts to defend the decision under review as presenting

only factual applications of settled law. Not so. The decision expressly holds that parties using withheld information to challenge how a crime occurred face a heightened materiality showing, in conflict with the Court's decision in *Kyles* v. *Whitley* that the standard for materiality is simply whether the withheld evidence "could reasonably be taken to put the whole case in * * * a different light." 514 U.S. 419, 435 (1995). And the court of appeals implicitly contradicts this Court's holdings through its unhinged speculation explaining away withheld evidence and its failure to consider the weakness of the government case at trial. It is vital that the Court address these errors because, as District of Columbia prisoners, petitioners lack access to most traditional avenues of *habeas* relief. *E.g.*, *Byrd* v. *Henderson*, 119 F.3d 34, 36-37 (D.C. Cir. 1997).

1. Far from disputing the existence of a conflict, the government divides the courts into *three* groups, rather than the two identified by petitioners. Br. in Opp. 18-19. Such confusion in the courts is a reason for granting the petition, not denying it, especially given that petitioners' *Brady* claims would be sustained under two of those three approaches, including the one endorsed by the government.

a. The government does not dispute that there is a stark division among the courts on whether post-trial information can be used to evaluate the materiality of evidence withheld prior to trial. The Supreme Court of Delaware and the Sixth Circuit categorically bar the consideration of post-trial information. See *Wright* v. *State*, 91 A.3d 972, 990 & n.61 (Del. 2014); *Apanovitch* v. *Bobby*, 648 F.3d 434, 437-38 (6th Cir. 2011). On the other side of the spectrum is the Supreme Court of Missouri, which the government acknowledges has articulated a standard under which post-trial information can be considered for any

purpose. Br. in Opp. 19-20 (citing *State ex rel. Griffin* v. *Denney*, 347 S.W.3d 73 (Mo. 2011), cert denied, 132 S. Ct. 1859 (2012) and *State ex rel. Woodworth* v. *Denney*, 396 S.W.3d 330 (Mo. 2013)); see also Former Prosecutors Amicus Br. 15-18.

The government contrasts the approach of *Griffin* and *Woodworth* with the Second Circuit's approach in *Leka* v. *Portuondo*, 257 F.3d 89 (2d Cir. 2001), claiming that court considered post-trial information in its *Brady* analysis, but only to show "how the trial would have unfolded if the government had disclosed known favorable information to the defense." Br. in Opp. 19. The government claims this approach "comports with *Brady*'s materiality inquiry." *Ibid.*

b. Having implicitly acknowledged a three-way conflict, the government hangs its opposition on the assertion that the court of appeals's decision is consistent with *Leka*, 257 F.3d 89. Br. in Opp. 18-19. That assertion is both irrelevant and incorrect.

i. It is irrelevant because under the standard applied by the Supreme Court of Missouri in *Griffin*, 347 S.W.3d 73, and *Woodworth*, 396 S.W.3d 330, petitioners would be entitled to relief under *Brady*. Based principally on the order of signals in *Griffin*, Br. in Opp. at 20 & n.8, the government claims that the Missouri cases turn on state *habeas* procedure. That claim would be a surprise to the State of Missouri, which, in *Griffin*, sought certiorari of the precise issue presented here. Pet. for Certiorari, *Denney* v. *Griffin*, No. 11-853, 2012 WL 73210 (Jan. 3, 2012), *denied* 132 S. Ct. 1859 (2012). Neither the State nor the respondent argued that the decision below turned on a unique feature of state procedure. See *ibid.*; Br. in Opp., *Denney* (Mar. 1, 2012). Nor could they have. *Griffin*, *Woodworth*, and *State ex rel. Engel* v. *Dormire*, 304 S.W.3d 120 (Mo. 2010), considered post-trial evidence in

applying the standards set by this Court as to whether a verdict is "worthy of confidence." *Woodworth*, 396 S.W.3d at 342 (quoting *Kyles*, 514 U.S. at 434); *Griffin*, 347 S.W.3d at 77 (citing *Kyles*); *Engel*, 304 S.W.3d at 129 (quoting *Kyles*).

The government does not dispute that, under the standard applied in Missouri, McMillan's 1992 sodomy murder would constitute part of "the totality of * * * evidence uncovered following the prior trial," and be considered for any inference it provides regarding the materiality of the withheld evidence. *Woodworth*, 396 S.W.3d at 345. Here, the 1992 murder, which occurred prior to the government's disclosure of McMillan's identity, is directly relevant to the materiality of the suppression of McMillan's suspicious behavior at the crime scene. It is obvious, powerful evidence of the materiality of the government's withholding of the identity of an alternative perpetrator that the alternative perpetrator beat another woman to death and sodomized her just blocks from where the victim in this case was beat to death and sodomized.

The conflict among the courts accordingly is triggered by this case. It is therefore irrelevant whether the decision under review is consistent with the Second Circuit's decision in *Leka*, 257 F.3d 89.

ii. The decision under review nevertheless does conflict with *Leka*, and that conflict further warrants this Court's review. The court of appeals, after holding that McMillan's 1992 murder of A.M. was not itself suppressed *Brady* evidence because it did not exist at the time of trial (which petitioners never contested), further held that "McMillan's murder of A.M. *likewise has no bearing* on the question of the materiality of any evidence that the government actually did withhold from the defense." Pet. App. 36a (emphasis added). The court's conclusion was

not limited to the particular facts of McMillan's 1992 murder. Instead, it reasoned, "*Brady* is the wrong framework" for any consideration of post-trial information and that such information could lead to relief only through "other procedures * * * subject to different standards." *Id.* 37a (citation omitted); see also Innocence Network Amicus Br. 18.

The decision under review therefore stands in stark contrast with the court's reasoning in *Leka*, of which the government approves, in which post-trial information was considered to evaluate how the original trial may have differed. 257 F.3d at 97, 106; Br. in Opp. 19; see Pet. 19-20. Contrary to the government's assertions, McMillan's 1992 murder serves that purpose in two ways.

First, the 1992 murder shows that evidence could have been developed that McMillan committed the murder without the participation of a large group, supporting the single-perpetrator theory and undermining the government's group-attack case. Pet. 19. The government makes the facile response that a large group was not "*necessary*" to murder Mrs. Fuller given her diminutive size. Br. in Opp. 18 (emphasis in original). That misses the point entirely; the government's theory has long been that the extent of Mrs. Fuller's injuries indicated a large-group attack. Br. in Opp. 3-4; Gov't C.A. Br. 59-61, 102-03. The fact that McMillan's 1992 murder and sodomy resulted in greater injuries to the victim undermines that inference, and shows that petitioners could have developed evidence that McMillan was capable of the attack on Mrs. Fuller by himself. Pet. App. 112a n.14.

Second, McMillan's 1992 sodomy of his murder victim suggests that defendants would have been able to develop evidence at trial of his proclivity for sodomy or sexual violence. Pet. 19. The government claims that is improper

speculation. Br. in Opp. 17-18. But it is no more speculative than the inference this Court drew in *Kyles*, where the Court evaluated suppressed statements by a government witness that the police should check the defendant's garbage, thus indicating that the witness may have planted evidence. 514 U.S. at 448. The Court recognized that post-trial testimony by the prosecutor that he could not recall ever searching a suspect's garbage "confirmed" the materiality of the withheld evidence. *Ibid.* That inference involved speculation, as the defense could not have called the prosecutor to testify and it is impossible to say whether the detectives on the case had similar experiences. See *California* v. *Greenwood*, 486 U.S. 35 (1988) (holding warrantless searches and seizures of garbage do not violate the Fourth Amendment).[1] That does not make the Court's inference impermissible; in the government's words, "some hypothesizing is inevitable." Br. in Opp. 25; see also Former Prosecutors Amicus Br. 16-18. Just as in *Kyles*, McMillan's 1992 murder confirms the "promising lines of inquiry" that defense counsel would have had both before and at trial had they known that McMillan was at the crime scene acting suspiciously. *Leka*, 257 F.3d at 106.

2. The decision under review not only deepens a split among the courts, it also flatly contradicts this Court's holdings regarding the *Brady* materiality standard. Petitioners identified three ways the decision under review did so; and the government's opposition does not undermine that analysis.

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[1] *Wood* v. *Bartholomew*, 516 U.S. 1 (1995), further supports the inferences petitioners draw from the 1992 murder. Pet. 20. What the Court rejected as speculation in *Wood* was an appellate court's musings on the possible uses trial counsel could have made of inadmissible evidence after that counsel testified that the evidence would not have affected his strategy. 516 U.S. at 7-8.

a. Earlier this year, the Court reiterated the principle that courts should not "emphasize[] reasons a juror might disregard new evidence while ignoring reasons she might not." *Wearry* v. *Cain*, 136 S. Ct. 1002, 1006-1007 (2016). That is precisely what the court did in this case. In one instance, it conjured a convoluted scenario where McMillan, a man who beat and robbed other middle-aged women in the neighborhood, innocently enters and exits the crime scene and carries away evidence of a brutal sodomy murder. Pet. 22-23; Pet. App. 50a-51a & n.81; see Former Prosecutors Amicus Br. 13-15.

In the other, it confronted Mr. Luchie's powerful evidence that he was in the alley at the coroner's estimated time of death, and heard groans coming from the garage but saw that the doors were closed. Pet. App. 50a. This last fact is especially important, because when Mr. Freeman found Mrs. Fuller's body, the door to the garage was open.[2] The natural inference from this evidence is that the one or two people responsible for Mrs. Fuller's death were in the garage committing the assault when Mr. Luchie was in the alley. Rather than explore the effect of that inference, the court instead came up with ways a jury may have disbelieved Mr. Luchie's disinterested recollection. *Ibid.*

The government endorses the court's hypothesizing; indeed, it even adds some hypothesizing of its own. Br. in Opp. 25-27 n.10. This Court has been clear, however, that it is inappropriate to gauge the probative value of with-

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[2] Mr. Freeman gave further exculpatory testimony. He testified that he did not see any large group cross the street to enter the alley, but had seen the man later identified as McMillan walking up and down the street throughout the day. Pet. App. 17a, 49a n.79.

held evidence by creating narratives through which "a juror might disregard new evidence." *Wearry*, 136 S. Ct. at 1007.

The government seeks to justify the court's speculation because of supposedly "overwhelming eyewitness testimony" of a large group attack. Br. in Opp. 26; *see id.* 28. Yet the government's eyewitnesses were so heavily impeached — even without the defense proposing any alternative explanation of the crime and without the additional impeachment evidence withheld by the government — that the jury still deliberated for a week, acquitted two defendants, and then deadlocked on two others for many more votes. See Pet. 24.

The purported eyewitness testimony is further undermined by the objective, crime-scene evidence. The government has no choice but to claim this evidence has minimal value. Br. in Opp. 29. But the undisputed scientific evidence was that Mrs. Fuller was more likely attacked by one or two assailants, rather than a large group. See Pet. 13. Indeed, the physical evidence contradicted the government's account of the core event in the murder — the sexual assault on Mrs. Fuller in which numerous people allegedly held her legs and arms. Br. in Opp. 4. That is impossible in the cramped corner of a small, trash-strewn garage, where science tells us the sexual assault occurred. Pet. 25; Pets. C.A. Br. 10-11. Moreover, because this objective evidence strongly suggests Mrs. Fuller was killed by one or two people, it further confirms the materiality of the withheld evidence regarding McMillan and Mr. Luchie's observations in the alley.

There is far more than a "reasonable likelihood [this withheld evidence] could have affected the judgment of the jury." *Wearry*, 136 S. Ct. at 1006 (citation omitted). The court of appeals was only able to reach a different

conclusion by improperly focusing on identifying "reason[s] a jury *could* have disbelieved" the withheld evidence. *Smith* v. *Cain*, 132 S. Ct. 627, 630 (2012).

b. The court of appeals's crediting of the government's eyewitnesses is also the source of its second error, as it artificially inflated the strength of the government's case in performing its materiality analysis. Pet. 23-25. The government therefore mistakes petitioners' contention, which is not that the court failed to undertake a cumulative analysis. Br. in Opp. 27-28. Rather, petitioners contend that the court of appeals failed to account properly for the "existing or potential evidentiary record." *Kyles*, 514 U.S. 439-440.

The government implicitly acknowledges that the court of appeals failed to consider that the case was a weak one, seeking to excuse that failure by asserting the case was strong. Br. in Opp. 28 & n.11. Again, the objective evidence — here, the jury's prolonged deliberations and split verdict — demonstrate the contrary. The government relies instead on the use of the word "overwhelming" in a footnote from the background summary by the appellate panel that heard most petitioners' direct appeal,[3] and statements by the trial prosecutor. As to the former, context makes plain that the appellate panel was merely explaining its summary overview of the 1985 trial, in which the group-attack theory was uncontested and which took place before the withheld evidence was discovered. See *Catlett* v. *United States*, 545 A.2d 1202, 1206 n.2 (D.C. 1988). As to the prosecutor, he acknowledged that the trial "easily could have gone the other way." C.A. App.

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[3] Charles Turner appealed his conviction separately. See *Turner* v. *United States*, Nos. 86-314 & 90-530, Mem. Op. & J. (D.C. Jan. 24, 1992). The government's contrary assertion is mistaken. See Br. in Opp. 6.

1758. His statements that the prosecution "ended up [having] a much stronger case" because "everything sort of fell [the government's] way" only underscore the limitations on defense strategy imposed by the government's suppression. *Ibid.*

c. Finally, and most fundamentally, the decision under review conflicts with this Court's standard that withheld evidence is material if it "could reasonably be taken to put the whole case in * * * a different light." *Kyles*, 514 U.S. at 435. By holding that it is "quite difficult" to show materiality when the withheld evidence challenges "the basic structure of how the crime occurred," Pet. App. 54a, the court of appeals turned this Court's standard on its head.

Evidence challenging the basic structure of the crime is the quintessential example of evidence most likely to put a trial in "a different light" because it would completely change the character of the trial. *Kyles*, 514 U.S. at 435. Petitioners have identified such evidence. The suppressed evidence would have introduced an entirely new alternative-perpetrator defense, centered on a suspect with a history of violence against women, that would have been bolstered by physical evidence and multiple unrelated accounts, including Mr. Luchie's and Mr. Freeman's. See Former Prosecutors Amicus Br. 11-13.

Again forgetting that the purported eyewitnesses were so heavily impeached at trial that the jury returned a split verdict after extended deliberations, see Pet. App. 45a-47a, 49a, the government emphasizes that petitioners' alternative-perpetrator defenses "do in fact conflict with '*virtually everything* that the government's eyewitnesses said about the crime.'" Br. in Opp. 22 (quoting Pet. App. 54a). Exactly right. The Court has found evidence material when it contradicted some of the prosecution case. See *Wearry*, 136 S. Ct. at 1010-1011 (Alito, J., dissenting)

(noting numerous unaffected inculpatory witnesses)); *Smith*, 132 S. Ct. 629-630 (noting unaffected inculpatory evidence); *Kyles*, 514 U.S. 435 n.8, 443 n.14, 451 (noting inculpatory eyewitness and physical evidence unaffected by withheld evidence); Pet. 26-28. The notion that evidence that contradicts all of the government's eyewitnesses should somehow be deemed less material is counterintuitive to say the least.

The government's final response is to identify a few extreme cases in which courts have held that evidence of an alternative perpetrator is not material. Br. in Opp. 23-24. In each case, however, the flimsy alternative-perpetrator theory contradicted objective evidence. Here, it is the government case that is incompatible with the objective evidence. In any event, to the extent that the cases reveal confusion among the lower courts regarding the materiality of alternative-perpetrator evidence, that is yet another reason to grant the petition, not reject it. See Innocence Network Amicus Br. at 12-17.

* * * * *

The government's brief in opposition underscores the confusion in the lower courts regarding how to apply *Brady*'s materiality standard when post-trial events shed light on the materiality of evidence at trial. In addition, the court of appeals departed from this Court's precedents regarding *Brady* materiality in numerous ways. Those errors are so pronounced that the Court may wish to consider the possibility of summary reversal.

In all events, the petition for a writ of certiorari should be granted.

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BRIEF FOR FORMER PROSECUTORS AS AMICI CURIAE SUPPORTING PETITIONERS

INTEREST OF AMICI CURIAE

Amici are former prosecutors who have dedicated years of service to the criminal justice system and have a continuing and active interest in the fair and effective administration of criminal trials.[1] As long recognized by this Court, "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963) (citing *Mooney* v. *Holohan*, 294 U.S. 103 (1935)). In implementing this fundamental principle, the Court found over fifty years ago in *Brady* v. *Maryland* that a prosecutor's failure to disclose "evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87.

From amici's many years of combined prosecutorial experience, they understand that basic fundamental fairness and public confidence in our justice system depend upon a prosecutor's faithful compliance with his or her affirmative duty of disclosure. Amici sub-

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[1] No counsel for a party authored this brief, in whole or in part, and no person other than amici or their counsel contributed any money to fund its preparation or submission. Counsel for amici provided timely notice of amici's intent to file this brief, and the parties have consented. A list of amici is appended to this brief.

mit this brief because the District of Columbia Court of Appeal's decision undermines the constitutional protections of due process and right to a fair trial on which that duty is based. At a time when our criminal justice system is coming under increasing challenge, now is scarcely the time to weaken the protections that due process requires.

SUMMARY OF ARGUMENT

This case presents precisely the type of evidence withholding that this Court has consistently recognized in its *Brady* jurisprudence as a violation of an accused's right to a fair trial mandated by the Due Process Clause. On October 1, 1984, the body of Catherine Fuller, a forty-eight-year-old mother of six, was found in an alley in Washington D.C.—she had been robbed, violently sodomized, and beaten to death. The pressure to find the person (or persons) who committed this heinous sodomy-murder was understandably enormous. There was, however, no physical evidence identifying a perpetrator. The government conducted about 400 interviews of civilian witnesses and, based on conflicting and ever-changing statements of a small subset of those interviews, the prosecution developed the theory that a group of thirteen young men committed the crime.[2] In 1985, the six petitioners were convicted of having killed Mrs. Fuller in a group attack.[3] The jury deliberated for

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[2] Court of Appeals Brief of Petitioners Clifton Yarborough, Charles Turner, Levy Rouse, and Timothy Catlett ("Pets. C.A. Br.") 1-5, 24 (citing evidence in the record).

[3] Co-defendant Russell Overton has filed a companion petition for certiorari in *Overton* v. *United States*, No. 15-1504. An eighth individual, Steven Webb, was convicted, but has since died in prison. Pets. C.A. Br. 7 n.1.

seven days prior to convicting six defendants and acquitting two others. In the case of two other defendants, Christopher Turner and Russell Overton, the jury first reported that they could not reach a verdict and, only after being instructed by the court to continue to try, did the jury render a guilty verdict after two additional days of deliberations. As acknowledged by the lead prosecutor, the case against petitioners—which was based solely on conflicting testimony from witnesses with substantial credibility problems—was "[n]ot a good one," and "easily could have gone the other way." Pets. C.A. Br. 61 (citing testimony in record).

Years after the trial, it came to light that the government failed to disclose a plethora of favorable evidence to the defense, including, among other things, at least six eyewitness accounts suggesting that one or two alternative perpetrators, rather than a large group, committed the murder. That evidence included three eyewitness statements specifically identifying James McMillan, who was a known "violent criminal prone to assaulting and robbing vulnerable women in the area" where Mrs. Fuller was murdered. *Turner* v. *United States*, 116 A.3d 894, 915 (D.C. 2015). Prior to the trial, prosecutors had only disclosed to the defense that the street vendor who found Mrs. Fuller's body had observed two men in the alley—one of whom "appeared to be concealing an object under his coat"—who had fled when the police arrived. *Id.* at 908. Despite a specific request for the identities of those two men, prosecutors failed to disclose that Mr. McMillan was one of them. Pets. C.A. Br. 12; *Turner*, 116 A.3d at 908. Unbeknownest to the defense, two *other* witnesses also had reported to the government that Mr. McMillan was in the alley where

Mrs. Fuller's body was found shortly after her murder. *Turner*, 116 A.3d at 908. Those witnesses confirmed Mr. McMillan's "suspicious behavior" around the time Mrs. Fuller was murdered. *Id.*

Making matters worse, the prosecutors also failed to disclose to the defense the statements of three witnesses who had walked through the alley around the estimated time of Mrs. Fuller's death, and who each reported that they did not see any group of individuals. *Id.* Two of those witnesses also reported hearing groans coming from inside the small garage in the alley where Mrs. Fuller's body was found. *Id.* As acknowledged by the trial prosecutor, if the assault was taking place at that time it "could not have been committed by a large group of people." *Id.* at 915.

Despite the plain import of this exculpatory evidence in a case that the prosecutor has acknowledged was a weak one, the District of Columbia Court of Appeals concluded that this failure to turn over exculpatory information was not "material" under *Brady*. *Id.* at 926. That decision represents a serious departure from the principles set forth by this Court in its *Brady* line of cases, as well as common sense principles of fairness and justice. The Court should grant review to correct an egregious *Brady* violation. The heinous nature of the crime at issue here should not lead to a reduction of due process protections, but a more observant application of them.

In *United States* v. *Agurs*, this Court expressly found that "obviously exculpatory" evidence must be disclosed under *Brady* as a matter of "elementary fairness," and that prosecutors must be faithful to their duty that "justice shall be done." 427 U.S. 97, 107, 110-11 (1976) (internal quotation marks omitted). Indeed, we are not aware of a single decision that has

found undisclosed eyewitness identification of an alternative perpetrator at a crime scene immaterial under *Brady*.

The Court also has consistently made clear that to prevail on a *Brady* claim, petitioners need *not* show that they "more likely than not would have been acquitted had the new evidence been admitted." *Wearry* v. *Cain*, 136 S. Ct. 1002, 1006 (2016) (citing *Smith* v. *Cain*, 132 S. Ct. 627, 629-31 (2012)) (internal quotation marks omitted). Rather, petitioners "must show only that the new evidence is sufficient to 'undermine confidence' in the verdict." *Id.* Plainly, under the salient facts, that standard has been met here.

Finally, in conducting its materiality analysis, the Court of Appeals also expressly disregarded highly probative post-trial events, specifically Mr. McMillan's post-trial conviction for a shockingly similar sodomy-murder that took place just three blocks from the alley where Mrs. Fuller's body was found. *Turner*, 116 A.3d at 917-18. In excluding such evidence, the Court of Appeals deepened a split in authority as to whether post-trial events can be considered in a *Brady* materiality analysis.[4] Amici believe that at least where, as here, post-trial events directly relates to and confirms the materiality of the withheld evidence, the principles that undergird *Brady* require that such evidence be considered and not simply disregarded.

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[4] *See* Pet. at 16-20 (citing *Apanovitch* v. *Bobby*, 648 F.3d 434 (6th Cir. 2011); *Leka* v. *Portuondo*, 257 F.3d 89 (2d Cir. 2001); *Wright* v. *State*, 91 A.3d 972 (Del. 2014); *State ex rel. Woodworth* v. *Denney*, 396 S.W.3d 330 (Mo. 2013); *State ex rel. Griffin* v. *Denney*, 347 S.W.3d 73 (Mo. 2011)).

Amici respectfully request that this Court grant petitioners' petition for a *writ of certiorari* to correct an egregious *Brady* violation that is contrary to well-established *Brady* precedent and threatens to undermine the *Brady* standard. The *Brady* concept is so essential to our system of criminal justice that it must be zealously guarded against attempts to pare it back—particularly at a time when the justice system is under challenge. This Court's review is also needed to resolve a split in authority regarding whether courts can consider post-trial events in determining the materiality of suppressed evidence under *Brady* and to provide uniform guidance to prosecutors and the lower courts where fundamental fair trial rights are at stake.

ARGUMENT

I. THE COURT OF APPEALS' MATERIALITY STANDARD IS INCONSISTENT WITH *BRADY* AND DOES NOT EFFECTIVELY PROTECT DUE PROCESS.

Under *Brady*, prosecutors have an "affirmative duty to disclose evidence favorable to a defendant." *Kyles* v. *Whitley*, 514 U.S. 419, 432 (1995). That obligation reflects the "special role played by the American prosecutor in the search for truth in criminal trials." *Strickler* v. *Greene*, 527 U.S. 263, 281 (1999); *see United States* v. *Nixon*, 418 U.S. 683, 709 (1974) ("The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence."). Where the government withholds evidence favorable to the defendant, this Court has explained, the prosecutor abandons that assigned role and assumes instead "the role of an architect of a proceeding

that does not comport with the standards of justice." *Brady*, 373 U.S. at 87-88; *Kyles*, 514 U.S. at 432-33.

A violation of constitutional due process occurs where the withheld evidence is "material"—where there is a "'reasonable probability'" of "undermin[ing] confidence in the verdict." *E.g.*, *Kyles*, 514 U.S. at 434–35 (quoting *United States* v. *Bagley*, 473 U.S. 667, 678 (1985)); *see Smith*, 132 S. Ct. at 630. "The question [under *Brady*] is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial." *Kyles*, 514 U.S. at 434. In determining whether the withheld evidence was material, a reviewing court must weigh the effect of the suppressed evidence, individually and cumulatively, in light of the record presented at trial. *See, e.g.*, *id.* at 436 & n.10; *Bagley*, 473 U.S. at 683.

A. The Suppressed Evidence of Alternative Perpetrators Constitutes Quintessential *Brady* Material.

As detailed in the petition, the government failed to disclose extensive evidence favorable to the defense, including, among other things, multiple eyewitness accounts of an alternative perpetrator, Mr. McMillan, together with other eyewitness accounts that further undercut the prosecution's basic group-attack theory. Beginning at least as early as then-Judge Marshall's opinion in *United States ex rel. Meers* v. *Wilkins*, 326 F.2d 135 (2d Cir. 1964), decided a year after *Brady*, the "courts have long recognized" that such evidence about other potential perpetrators is "core *Brady* material" that must be disclosed. *See Watkins* v. *Miller*, 92 F. Supp. 2d 824, 846 (S.D. Ind.

2000) (citing *United States ex rel. Meers*, 326 F.2d at 138 (2d Cir. 1964)). Those decisions include:

- *Kyles* v. *Whitley*, 514 U.S. 419, 447-48 (1995) (evidence of key eyewitness's "affirmatively self-incriminating assertions"—supporting the theory of an alternative perpetrator—was material under *Brady*);
- *Williams* v. *Ryan*, 623 F.3d 1258, 1265 (9th Cir. 2010) (evidence about a second suspect to a crime is "classic Brady material");
- *DiSimone* v. *Phillips*, 461 F.3d 181, 195 (2d Cir. 2006) (evidence that another person confessed to stabbing the victim was "clearly Brady material");
- *Mendez* v. *Artuz*, 303 F.3d 411, 416-17 (2d Cir. 2002) (per curium) (evidence of an alternative perpetrator with alternative motive was material under *Brady* and required reversal);
- *Clemmons* v. *Delo*, 124 F.3d 944, 949-52 (8th Cir. 1997) (evidence that an eyewitness saw someone else commit the murder was material, exculpatory evidence under *Brady*);
- *United States* v. *Robinson*, 39 F.3d 1115, 1116–19 (10th Cir. 1994) (evidence that eyewitness saw another person, whose description closely matched another witness rather than the defendant, pick up the cocaine should have been disclosed under *Brady*);
- *Cannon* v. *Alabama*, 558 F.2d 1211, 1215-16 (5th Cir. 1977) (evidence of an eyewitness who would positively identify an alternative perpe-

trator was material, exculpatory evidence under *Brady*); and

- *United States ex rel. Meers* v. *Wilkins*, 326 F.2d 135, 136-40 (2d Cir. 1964) (evidence from two eyewitnesses identifying an alternative perpetrator committing and fleeing the scene of the robbery was "material" under *Brady*).

Indeed, amici are not aware of a single case that has found undisclosed evidence of an alternative perpetrator linked to the crime scene to be immaterial under *Brady*. Yet, in this case, the government withheld information concerning *two* alternative perpetrators who were known violent criminals and were specifically identified by witnesses as having been at the crime scene—both Mr. McMillan, and another individual, James Blue. *See Turner*, 116 A.3d at 908-10. It is difficult to imagine evidence that could be any more helpful to the defense than evidence supporting a conclusion that someone other than the defendant committed the crime—particularly where, as here, there is no physical evidence implicating any defendant.[5]

B. The Court of Appeals' Analysis of the Suppressed Evidence Is Inconsistent with *Brady* and Its Progeny.

Despite this jurisprudence, the Court of Appeals nevertheless found all the suppressed evidence, including the withheld alternative perpetrator evidence concerning Mr. McMillan, immaterial. In its sum-

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[5] Notably, nearly all of the purported eyewitnesses called by the government at trial who claimed to have seen a large group of people fatally assault Mrs. Fuller have, under oath, recanted their testimony. Pets. C.A. Br. 40.

mary dismissal of the alternative perpetrator evidence, the Court of Appeals speculated, without foundation, that the jury would have more likely concluded that Mr. McMillan was another participant in the group attack, and it would have been "daunting for the defense to contend that McMillan committed the crime with just one or two accomplices." *Turner*, 116 A.3d at 925. The lower court further found that the suppressed evidence in its entirety "would not have directly contradicted the government's witnesses or shown them to be lying, and it did not tend to show that any given appellant was misidentified," because the suppressed evidence puts at issue the "basic structure of how the crime occurred" (*i.e.*, the prosecution's theory of a group attack versus a single-perpetrator attack). *Id.* at 926. The Court of Appeals, therefore, concluded that "[t]his makes the burden on appellants to show materiality quite difficult to overcome, because it requires a reasonable probability that the withheld evidence . . . would have led the jury to doubt *virtually everything* that the government's eyewitnesses said about the crime." *Id.* (emphasis in original).

Based on an unbroken record of this Court and the lower Courts, the Court of Appeals undertook an analysis and applied a standard that was not within its authority. This Court has already rejected the "sufficiency of the evidence" approach employed by the Court of Appeals, explicitly stating in *Kyles*, that materiality "is not a sufficiency of evidence test." 514 U.S. at 434. The Court disagreed with the dissent for "assum[ing] that Kyles must lose because there would still have been adequate evidence to convict even if the favorable evidence had been disclosed." *Id.* at 435 n.8. The Court emphasized that the suppressed evi-

dence was still material under *Brady* even if it (i) "would have left two prosecution witnesses '"totally untouched,"' (ii) would not cause the jury to doubt *all* the eyewitnesses, and (iii) was '"perfectly consistent"' with the government's case. *Id.* (emphasis added).

A court cannot substitute its judgment for what the jury may have concluded had exculpatory, inconsistent evidence been presented. "One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 435. *See also Wearry*, 136 S. Ct. at 1006 ("Evidence qualifies as material when there is *any reasonable likelihood* it could have affected the judgment of the jury.") (citations and internal quotation marks omitted) (emphasis added). Accordingly, contrary to the finding of the Court of Appeals, "it is not necessary that 'every item of the State's case would have been directly undercut if the *Brady* evidence had been disclosed.'" *Bies* v. *Sheldon*, 775 F.3d 386, 399 (6th Cir. 2014) (quoting *Kyles*, 514 U.S. at 451).

Significantly, missing from the Court of Appeals analysis was a meaningful assessment of the impact the suppressed evidence would have had on the defense's strategy at trial. As the *Brady* rule recognizes, our criminal justice system has certain imbalances prior to the start of a criminal trial. Specifically, a prosecution generally has "tactical advantages" over the accused, including "greater financial and staff resources"; beginning the "investigation shortly after the crime has been committed when physical evidence is more likely to be found and when witnesses are more apt to remember events"; the ability to "force

third persons to cooperate"; and the ability "to search private areas and seize evidence" with probable cause. *Wardius* v. *Oregon*, 412 U.S. 470, 475 n.9 (1973) (internal quotation marks omitted). A defendant, on the other hand, often necessarily relies on his or her constitutional protections—including the *Brady* rule—to offset those advantages.

Alternative perpetrator evidence is powerful evidence to the defense. Not only can it be used to lay a foundation for the possibility that someone else committed the offense, *see Case* v. *Hatch*, 773 F. Supp. 2d 1070, 1084-85 (D.N.M. 2011), *vacated on procedural grounds*, 708 F.3d 1152 (10th Cir. 2013), but it can be used, among other things, to uncover leads and various defense theories, *see Banks* v. *Reynolds*, 54 F.3d 1508, 1519 (10th Cir. 1995), question the certainty of prosecution witnesses on cross-examination, *see Case*, 773 F. Supp. 2d at 1088, undermine the jury's confidence in the adequacy of the State's investigation and theory, *see Mendez*, 303 F.3d at 415, and impeach the credibility of the prosecution's witnesses by presenting contradictory evidence, *see Jamison* v. *Collins*, 100 F. Supp. 2d 647, 695 (S.D. Ohio 2000), *aff'd*, 291 F.3d 380 (6th Cir. 2002).

Here, the materiality of the suppressed evidence to the defense strategy is further underscored by the defense counsel's specific request for the identity of the men observed in the alley. Although a lack of a request for information does not excuse the government's suppression of it, *see Strickler*, 527 U.S. at 282, "[w]hen the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." *Agurs*, 427 U.S. at 1064. Without the suppressed alternative perpetrator evidence, none of the defendants had the ability to chal-

lenge the prosecutor's group-attack theory; instead, each was left to assert at trial that he was not a participant in the alleged group attack.

Moreover, the Court of Appeals' materiality analysis fails to take into account the weakness of the prosecution's case here. As stated by this Court, "if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *Agurs*, 427 U.S. at 113.[6] Had petitioners been given the opportunity to present evidence regarding Mr. McMillan, the evidence on which they were ultimately convicted may have appeared even less convincing in this case, which the lead prosecutor acknowledged was a close one. Pets. C.A. Br. 61.

The Court of Appeals' circumscribed view of a prosecutor's duty to disclose alternative perpetrator evidence runs counter to *Brady* jurisprudence, and the truth-seeking process and principles of fairness on which it is based.

C. The Court of Appeals Improperly Based Its *Brady* Materiality Determination On Its Assessment of the Credibility of the Evidence.

It is a bedrock of the American legal system that credibility determinations are questions for the fact-finder—in this case, the jury. *See, e.g.*, *Jackson* v. *Denno*, 378 U.S. 368, 386 n.13 (1964) ("Questions of

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[6] *See also Case*, 773 F. Supp. 2d at 1084 (citing *Banks*, 54 F.3d at 1518) (recognizing that a conviction only supported by the prosecution's inconsistent eyewitness testimony is "significant[ly] weak[]" and the verdict is "already questionable"); *Gantt* v. *Roe*, 389 F.3d 908, 913 (9th Cir. 2004) (holding that newly discovered information is material when it undermines a conviction based upon little physical evidence).

credibility, whether of a witness or a confession, are for the jury.") Even the year after *Brady* was decided, courts recognized that they should not "speculate as to the effect" withheld evidence would have had on a jury. *United States ex rel. Meers*, 326 F.2d at 140. Accordingly, this Court has explicitly rejected *Brady* materiality arguments that focus on what "the jury *could* have disbelieved" without any showing that the jury actually "*would* have done so." *Smith*, 132 S. Ct. at 630 (emphasis added).

Nevertheless, the Court of Appeals here focused its *Brady* analysis in part on what it thought a jury "might have suspected"—even though the appellate court did not have the benefit of observing the witnesses and evidence presented at trial. *Turner*, 116 A.3d at 924. The court ultimately dismissed the suppressed evidence because the alternative perpetrator theory it supported "would have been exceedingly implausible and difficult for the jury to accept." *Id.* at 925. The question under *Brady*, however, is whether, in the absence of the suppressed evidence, the defendant received a fair trial. *Kyles*, 514 U.S. at 434. A primary point of *Brady* is to prevent and preclude that type of appellate court analysis and judging of the evidence. The Court of Appeals' approach promotes impermissible relative credibility determinations and speculation on the part of prosecutors and judges and further underscores the need for this Court's confirmation on the proper application of *Brady* and its progeny. *See Smith*, 132 S. Ct. at 630 ("[T]he dissent['s] . . . various reasons why the jury might have discounted . . . undisclosed statements . . . merely leaves us to speculate about [what] . . . the jury would have believed."); *Lindsey* v. *King*, 769 F.2d 1034, 1040 (5th Cir. 1985) ("It was for the jury, not the

prosecutor, to decide whether the contents of an official police record were credible.").[7]

II. THIS COURT'S GUIDANCE REGARDING WHETHER POST-TRIAL EVENTS CAN BE CONSIDERED IN A *BRADY* MATERIALITY ANALYSIS IS NECESSARY.

As the petition explains, there is a split of authority over whether post-trial events can be considered in determining whether suppressed evidence is material under *Brady* and its progeny.[8] This Court's guidance is necessary. A clear articulation and understanding of the *Brady* materiality standard is of paramount importance; the legal standards upon which prosecutors and the courts rely must be clear in order "to ensure that a miscarriage of justice does not occur." *Bagley*, 473 U.S. at 675; *see also United States* v. *Olsen*, 737 F.3d 625, 626 (9th Cir. 2013) (recognizing an "epidemic of *Brady* violations" that "[o]nly judges can put a stop to").

Amici respectfully submit that the District of Columbia Court of Appeals' categorical refusal to consider post-trial events in its *Brady* materiality analysis is inconsistent with the constitutional principles that undergird *Brady*. The focus of the *Brady* doctrine is fairness. *See United States* v. *Beasley*, 576

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[7] For the foregoing reasons, the Court should also grant the companion petition for certiorari filed in *Overton* v. *United States*, No. 15-1504.

[8] *See* Pet. at 16-20 (citing *Apanovitch* v. *Bobby*, 648 F.3d 434 (6th Cir. 2011); *Leka* v. *Portuondo*, 257 F.3d 89 (2d Cir. 2001); *Wright* v. *State*, 91 A.3d 972 (Del. 2014); *State ex rel. Woodworth* v. *Denney*, 396 S.W.3d 330 (Mo. 2013); *State ex rel. Griffin* v. *Denney*, 347 S.W.3d 73 (Mo. 2011)).

F.2d 626, 630 (5th Cir. 1978) ("*Brady* is not a discovery rule, but a rule of fairness and minimum prosecutorial obligation."); *United States* v. *Mahaffy*, 693 F.3d 113, 134 (2d Cir. 2012) ("*Brady* violations obscure a trial's truth-seeking function and, in so doing, place criminal defendants at an unfair disadvantage."). The disclosure of exculpatory evidence serves "to justify trust in the prosecutor as 'the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Kyles*, 514 U.S. at 439 (quoting *Berger* v. *United States*, 295 U.S. 78, 88 (1935)). "The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt." *Agurs*, 427 U.S. at 112. To ignore evidence that confirms the materiality of undisclosed evidence runs counter to those principles.

As stated in the Benchbook for U.S. District Court Judges—a practical manual for federal judges prepared by the Federal Judicial Center's Benchbook Committee—"the definition of 'materiality' necessarily is retrospective. It is used by an appellate court after trial to review whether a failure to disclose on the part of the government was so prejudicial that the defendant is entitled to a new trial." Section 5.06(B)(3)(a); *see also United States* v. *Coppa*, 267 F.3d 132, 140 (2d Cir. 2001) ("[T]he scope of a defendant's constitutional right—is ultimately defined retrospectively, by reference to the likely effect that the suppression of particular evidence had on the outcome of the trial.") Courts consider not only the direct impact of the suppressed evidence (*e.g.*, if it contradicts evidence offered at trial), but how the suppressed evidence could have been used by the defense and what further exculpatory information it may have uncov-

ered had it been disclosed. *See Leka* v. *Portuondo*, 257 F.3d 89, 101 (2d Cir. 2001) (*Brady* evidence "could have led to specific exculpatory information" if the defense undertook further investigation); *Banks*, 54 F.3d at 1519 (recognizing that "evidence in the hands of a competent defense attorney may be used 'to uncover other leads and defense theories'"). It is entirely consistent with the purpose of *Brady*—and often necessary—to "consider[] all available evidence uncovered following the trial" in performing this retrospective analysis. *State ex rel Griffin* v. *Denney*, 347 S.W.3d 73, 77 (Mo. 2011) (en banc).

This Court has recognized that post-trial events may be used in this probative way to show that suppressed evidence would have affected the outcome of the trial. In *Kyles*, the government suppressed self-incriminating statements by an adverse witness that could have been used to "attack[] the reliability of the investigation" and "would have supported the defense's theory that [the witness] was no mere observer, but was determining the investigation's direction and success." 514 U.S. at 446, 448. In assessing the materiality of the suppressed evidence, the Court stated that the "potential for damage from using" the statement was "*confirmed* by the prosecutor's admission at one of Kyles' *post-conviction* hearings, that he did not recall a single instance before this case when the police had searched and seized garbage on the street in front of a residence." *Id.* at 447-48 (emphases added).[9]

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[9] *See also Wood* v. *Bartholomew*, 516 U.S. 1, 7, 11 (1995) (finding that defense counsel's "candid acknowledgement" during post-conviction proceedings "that disclosure would not have affected the scope of his cross-examination" was of "great[] importance" in determining the materiality of the suppressed evidence).

Here, in its *Brady* analysis, the Court of Appeals refused to consider that Mr. McMillan (one of the alternative perpetrators whose identities were suppressed by the prosecution) was convicted of committing a similar sodomy-murder, because that particular crime occurred after petitioners' trial. *Turner*, 116 A.3d at 917. While post-trial events themselves, are of course, not suppressed evidence for purposes of *Brady*, they may be probative—as this Court has recognized—of the materiality of the evidence that *was* suppressed. *See Kyles*, 514 U.S. at 447-48. The use of post-trial events to show the likely effect the suppressed evidence would have had on the trial eliminates an element of the guesswork necessarily involved in a retrospective *Brady* materiality analysis and furthers *Brady*'s overarching goal of ensuring fair trials. As stated by this Court, the "proper standard of materiality" is the "justice of the finding of guilt." *Agurs*, 427 U.S. at 112.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 14, 2016

LIST OF AMICI CURIAE

W. Thomas Dillard served as the United States Attorney for the Northern District of Florida from 1983 through 1987, as the United States Attorney for the Eastern District of Tennessee in 1981, as an Assistant United States Attorney for the Eastern District of Tennessee from 1967 through 1976 and from 1978 through 1983, and as a United States Magistrate Judge for the Eastern District of Tennessee from 1976 through 1978.

John P. Flannery II served as an Assistant United States Attorney for the Southern District of New York from 1974 through 1979.

J. Alan Johnson served as the United States Attorney for the Western District of Pennsylvania from 1981 through 1989.

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RECORD AND BRIEF

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CLIFTON E. YARBOROUGH, CHRISTOPHER D. TURNER, KELVIN D. SMITH, CHARLES S. TURNER, LEVY ROUSE, & TIMOTHY CATLETT,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The District Of Columbia Court Of Appeals

BRIEF OF THE INNOCENCE NETWORK AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Innocence Network is an affiliation of organizations from around the world dedicated to providing pro bono legal and investigative services to individuals seeking to prove their innocence, and working to redress the causes of wrongful convictions. The sixty-seven current members of the Network represent hundreds of prisoners with innocence claims in all fifty states, the District of Columbia, and abroad.[2]

The Innocence Network and its members are dedicated to improving the accuracy and reliability of the criminal justice system. Drawing on lessons from cases in which innocent persons were convicted, the Network advocates study and reform designed to enhance the truth-seeking functions and procedures of the criminal justice system to ensure that future wrongful convictions are prevented.

The Innocence Network frequently files amicus briefs in cases raising important issues of criminal law, including the due process protections afforded by *Brady v. Maryland*, 373 U.S. 83 (1963). *See, e.g.*,

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[1] *Amicus* timely notified all parties of its intention to file this brief, and their consent letters have been submitted to the Clerk. *Amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. The Mid-Atlantic Innocence Project, a member of the Innocence Network and co-counsel for a petitioner, has not made a monetary contribution intended to fund the preparation or submission of this brief.

[2] The appendix lists the Network's members.

Smith v. Cain, No. 10-8145 (U.S. 2011); *Keith v. Ohio*, No. 09-1052 (U.S. 2010).

The Innocence Network submits this brief to emphasize the central role that the constitutional protections announced in *Brady* occupy in our criminal trial system, and the profound injustices that will result if the District of Columbia Court of Appeals's misinterpretation of the *Brady* rule is allowed to stand. The Innocence Network believes, based on its extensive experience with cases of wrongful conviction, that *Brady* obligations must be robust; in order to guarantee fair trials and secure justice, courts should encourage prosecutors to err on the side of disclosure when it comes to exculpatory evidence, and courts should consider all available evidence in evaluating whether confidence in a guilty verdict has been undermined.

SUMMARY OF ARGUMENT

Petitioners were convicted of the 1984 robbery, sodomy, and murder of Mrs. Catherine Fuller in Washington, D.C. After learning years later that prosecutors had failed to disclose valuable exculpatory evidence at their trial—including evidence pointing to two alternative perpetrators—petitioners sought relief under *Brady*. The court below denied post-conviction relief.

In doing so, the court below effectively eviscerated *Brady*'s protections by crafting a fundamentally different disclosure standard. It blessed the suppression of eyewitness testimony identifying plausible alternative perpetrators, despite widespread recognition that such evidence constitutes material, exculpatory evidence under *Brady*. In addition, rather than following this Court's balancing test for

materiality—which takes into account all available evidence bearing upon the significance of the withheld material—the court below adopted a bright-line rule that precludes consideration of post-conviction events. These rulings erroneously disregarded that the suppressed evidence would have "put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995).

If left unchecked, the decision below threatens to end the *Brady*-mandated search for truth and justice. Other jurisdictions may follow the D.C. Court of Appeals's lead in disregarding powerful alternative-perpetrator evidence, resulting in inflexible standards squarely at odds with how *Brady* was designed to operate post-conviction. This Court should grant certiorari to ensure that the *Brady* rule is not undermined by categorical rules—like those imposed by the court below—with no basis in precedent and opposed to *Brady*'s fundamental policy.

I. This case presents the Court with an excellent opportunity to address important, recurring issues bearing upon the government's constitutional duty to disclose material, exculpatory evidence to defendants.

A. Studies—including those conducted by members of the Innocence Network—confirm what commonsense teaches: that *Brady* violations are strongly correlated with wrongful convictions. A *Brady* violation has especially severe impact on a defendant when the exculpatory material is evidence of an alternative perpetrator, as it was here; research shows such evidence is often crucial to a defendant's ability to present a complete narrative that could influence

a jury's deliberations on whether guilt has been proven beyond a reasonable doubt.

B. The time is ripe for this Court to again remind participants in the criminal justice system of the requirements of *Brady*. A recent string of egregious *Brady* violations threatens to erode public confidence in the criminal justice system. Because the great majority of prosecutors strive to abide by their *Brady* obligations, prosecutors and lower courts need this Court's clear guidance on how to apply *Brady*'s due process protections.

II. The D.C. Court of Appeals's interpretation of *Brady* conflicts with decisions of federal courts of appeals and state high courts across the country. Those courts have consistently held that suppressing evidence that plausibly implicates an alternative perpetrator is a classic *Brady* violation. *See, e.g.*, *Gumm v. Mitchell*, 775 F.3d 345, 364 (6th Cir. 2014); *United States v. Jernigan*, 492 F.3d 1050, 1056-57 (9th Cir. 2007) (en banc); *Banks v. Reynolds*, 54 F.3d 1508 (10th Cir. 1995); *Miller v. Angliker*, 848 F.2d 1312, 1322-23 (2d Cir. 1988); *Floyd v. State*, 902 So.2d 775, 785-86 (Fla. 2005); *People v. Beaman*, 890 N.E.2d 500, 511-14 (Ill. 2008); *Harrington v. State*, 659 N.W.2d 509, 525 (Iowa 2003); *see also Canales v. Stephens*, 765 F.3d 551, 575-76 (5th Cir. 2014); *Jarrell v. Balkcom*, 735 F.2d 1242, 1258 (11th Cir. 1984).

Where courts have held that evidence of a plausible alternative perpetrator is nonetheless immaterial, it is in circumstances not present here—such as when the prosecution's case centers on inculpatory physical evidence or objective indicia of guilt. *See, e.g.*, *Beuke v. Houk*, 537 F.3d 618, 634-36 (6th Cir. 2008); *Grube v. State*, 995 P.2d 794, 799 (Idaho 2000). That holistic approach is consistent with this

Court's precedents—the materiality of withheld information "must be evaluated in the context of the entire record." *United States v. Agurs*, 427 U.S. 97, 112-13 (1976).

The decision below clearly deviates from these precedents. The prosecutor withheld powerful evidence of *two* alternative perpetrators. And the case against petitioners—lacking in physical evidence or objective indicia of guilt—was admittedly "[n]ot a good one" and "easily could have gone the other way." Pet. 8 (citing record). To bring the District of Columbia in line with other jurisdictions, and in conformity with the correct *Brady* standard, this Court should grant review.

III. The D.C. Court of Appeals further diverged from *Brady* by flatly refusing to consider highly relevant post-conviction events when assessing whether the evidence suppressed pre-trial was material under the circumstances. The court's imposition of a bright-line rule admitting of no exceptions cannot be reconciled with this Court's precedents. The objectives of truth, justice, and fairness that animate *Brady* also mandate that a reviewing court take account of post-trial events that bear directly on the materiality of the suppressed evidence to the finding of guilt.

A. This Court has stressed that "[i]f the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor." *Agurs*, 427 U.S. at 110. Accordingly, the materiality analysis does not assess "the good faith or bad faith of the prosecution," *Brady*, 373 U.S. at 87; the due process violation occurs at trial, when the jury begins deliberations without having heard about the withheld exculpato-

ry material or where it might lead. Consistent with *Brady*'s function as a truth-seeking rule designed to ensure "'that justice shall be done,'" the materiality of a failure to disclose favorable evidence "must be evaluated in the context of the entire record," *Agurs*, 427 U.S. 111-12, with "confidence" in the correctness of the verdict top of mind, *Kyles*, 514 U.S. at 439.

In undertaking that evaluation, courts must take into account how post-conviction information has cast new light on undisclosed evidence in the prosecutor's file. A fact viewed as immaterial at the time of trial may appear very different after post-conviction confessions, recantations, or DNA analysis, for example. Of course, the point is not that such post-conviction events were withheld before trial—they had not yet occurred—but that they bear directly on the materiality of evidence that *was* withheld pre-trial. A reviewing court that sticks its head in the sand and refuses to consider post-conviction events cannot fairly assess whether the undisclosed information in the prosecutor's file "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 435. The post-conviction information exposes the error in the government's pre-trial strategic gamble, and where—as here—that error is of constitutional magnitude, it must be reversible post-conviction.

B. The decision below strains confidence in the criminal justice system by eliminating any consequence of the government's failure to disclose quintessentially exculpatory evidence that may prove material. Time and again, this Court has counseled prudent prosecutors to err on the side of disclosing evidence. And this Court has invalidated convictions—irrespective of the prosecutor's intentions or

subjective knowledge at the time of trial—where there was a "concern that the suppressed evidence might have affected the outcome of the trial." *Agurs*, 427 U.S. at 104, 110.

"The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles*, 514 U.S. at 434. Here, the shaky case against the defendants, the gravity of the suppressed evidence of alternative perpetrators, and the power of the post-conviction information in confirming the significance of the withheld facts irreparably undermine confidence in *this* verdict.

ARGUMENT

I. THE PETITION PRESENTS IMPORTANT AND RECURRING *BRADY* ISSUES THAT WARRANT THIS COURT'S REVIEW.

The job of prosecutor has traditionally attracted diligent public servants who pursue justice by following their *Brady* obligations. They seek to uncover truth and to ensure that trials are fair and wrongful convictions are avoided. But *Brady* violations do occur, and they are a leading cause of convictions of the innocent. The petition presents an excellent vehicle for this Court to clarify how *Brady*'s promise of justice is to be secured.

A. *Brady* Protections Are Critical For Avoiding Wrongful Convictions.

It is not hyperbole to say that our adversarial system of criminal justice depends on the effective functioning of the *Brady* doctrine. Strict compliance

with *Brady*'s disclosure rule helps resolve the unavoidable information imbalance between government investigators and criminal defendants, thereby ensuring that an accused is afforded a fair opportunity to present a complete defense to the jury. *See Brady*, 373 U.S. at 87. When the government withholds material, exculpatory evidence—whether knowingly or inadvertently—it risks securing the conviction of innocent defendants by denying them fair trials. Given the large number of prosecutions nationwide, it only takes *Brady* violations in a small proportion to infect a great many cases.

Studies by Innocence Network members have revealed an undeniable correlation between *Brady* violations and wrongful convictions. *See, e.g.*, *Government Misconduct*, INNOCENCE PROJECT OF MINNESOTA, http://ipmn.org/causes-and-remedies-of-wrongful-convictions/government-misconduct (last visited July 14, 2016) (finding *Brady* violations in 37% of 74 wrongful convictions). The Innocence Network is not alone in identifying and quantifying this alarming correlation. *See, e.g.*, Lissa Griffin, *Innocence and the Suppression of Exculpatory Evidence by Prosecutors*, in CONTROVERSIES IN INNOCENCE CASES IN AMERICA 79 (Sarah Lucy Cooper ed. 2014) (noting that the second-most "frequent basis for wrongful convictions has been prosecutorial suppression of exculpatory evidence"); N.Y.S. BAR ASS'N, TASK FORCE ON WRONGFUL CONVICTIONS, FINAL REPORT OF THE NEW YORK STATE BAR ASSOCIATION'S TASK FORCE ON WRONGFUL CONVICTIONS 19, 24-26 (2009) (identifying *Brady* violations as among the causes of over 50% of fifty-three wrongful convictions and compiling examples of violations); Bennett L. Gershman, *Reflections on* Brady v. Maryland, 47 S. TEX. L. REV. 685, 686 & n.8 (2006) (cataloging

sources finding that "hundreds of convictions have been reversed because of the prosecutor's suppression of exculpatory evidence."); Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399, 403 n.20, 425 n.134 (2006) (citing studies linking *Brady* violations to wrongful convictions); James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839, 1850, 1864 n.79 (2000) (finding *Brady* violations were one of "the two most common errors" leading to reversals of death sentences, accounting for almost one-fifth of such reversals).

This correlation is not surprising. It has long been recognized that withholding exculpatory evidence may impair the "preparation or presentation of the defendant's case." *United States v. Bagley*, 473 U.S. 667, 683 (1985). This information disparity is especially damaging to the defense when the undisclosed evidence relates to an alternative perpetrator. Studies analyzing juror behavior show that jurors are more likely to credit a defendant's version of events if presented with a complete and coherent narrative—including, in particular, evidence of who other than the defendant may have committed the crime—to counter the narrative presented by the prosecution. *See* John H. Blume et al., *Every Juror Wants a Story: Narrative Relevance, Third Party Guilt, and the Right to Present a Defense*, 44 AM. CRIM. L. REV. 1069, 1087-91 (2007).

Brady violations upend real lives. A few examples of *Brady*'s power illustrate the risks of diluting the doctrine.

- Michael Morton served over twenty-four years in prison for murdering his wife before being exonerated. At his trial, prosecutors withheld critical exculpatory evidence, including his son's eyewitness account of the crime, his neighbors' statements that on the day of the crime another man had parked behind the Mortons' home and walked into the woods nearby, and that someone in another city attempted to use Mrs. Morton's credit card after her murder. The withheld evidence pointed to a man who, after Mr. Morton's conviction, committed another murder very similar to Mrs. Morton's. *Michael Morton*, INNOCENCE PROJECT, http://www.innocenceproject.org/cases/michael-morton (last visited July 14, 2016).

- Jerry Watkins served thirteen years for abducting, raping, and murdering an eleven-year-old girl before being exonerated. He was convicted although no physical evidence connected him to the crime. After trial, he learned that prosecutors had investigated other suspects and had withheld an eyewitness's account of the abduction that pointed to a different suspect. *Jerry Watkins*, INNOCENCE PROJECT, http://www.innocenceproject.org/cases/jerry-watkins (last visited July 14, 2016).

- Kenneth Kagonyera served ten years in prison for a murder he did not commit. During the investigation, physical evidence collected from the crime scene was submitted for pre-trial DNA testing. The results of those tests exculpated Kagonyera. But the prosecution did not disclose those test results despite specific requests for them. *Kenneth Kagonyera*, INNOCENCE PROJECT,

http://www.innocenceproject.org/cases/kenneth-kagonyera (last visited July 14, 2016).

These are but three stories of how *Brady* violations lead to profound consequences. They demonstrate that wrongful convictions can result when there is no inculpatory physical evidence, and when a defendant is unable to offer evidence of an alternative perpetrator. When that inability stems from prosecutors withholding exculpatory evidence, the resulting verdict offends the Constitution.

B. High-Profile Violations Have Brought *Brady*-Related Issues To The Fore.

In the last decade, several instances of prosecutors failing to satisfy their disclosure obligations have garnered significant media attention. For example, in Washington, D.C., prosecutors committed serious *Brady* violations amounting to the "systematic concealment of significant exculpatory evidence" in the case against Senator Ted Stevens. *In re Special Proceedings*, 825 F.Supp.2d 203, 204-05 (D.D.C. 2011). The Attorney General responded by ordering additional training to ensure that federal prosecutors "understand fully their discovery obligations." Dep't of Justice, Press Release, *Attorney General Announces Increased Training, Review of Process for Providing Materials to Defense in Criminal Cases* (Apr. 14, 2009). In North Carolina, a district attorney was disbarred after failing to disclose exculpatory DNA evidence in the notorious prosecution of members of the Duke University lacrosse team. *See* Duff Wilson, *Hearing Ends in Disbarment For Prosecutor in Duke Case*, N.Y. TIMES, June 17, 2007, at A21. Meanwhile, lesser-known (but significant) *Brady* violations have been piling up across the country. *See United States v. Olsen*, 737 F.3d 625, 631-32 (9th Cir. 2013)

(Kozinski, J., dissenting from denial of rehearing *en banc*) (collecting cases "bear[ing] testament to this unsettling trend" of *Brady* violations); Griffin, *supra*, at 83 & n.89 (same). Such errors erode public confidence in the capacity of the adversarial system to uncover the truth.

This Court should address this significant issue, resolve the important questions presented in the petition, and correct the D.C. Court of Appeals's misinterpretation of *Brady* before it proliferates.

II. The Decision Below Conflicts With Numerous Circuits And State High Courts That Have Held That Evidence Of Alternative Perpetrators Is Material Under *Brady*.

Suppression of exculpatory information is material under *Brady* when disclosure of "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435.

For decades, federal courts of appeals and state high courts applying this standard have held that evidence of a plausible alternative perpetrator qualifies as material unless there is strong objective evidence of a defendant's guilt. Yet the D.C. Court of Appeals held otherwise. It excused the suppression of admittedly exculpatory evidence the government had *before the trial*—despite a record bereft of physical evidence or reliable indicia of petitioners' guilt—based on bald speculation about why the jury would have disregarded the evidence. This aberrant ruling, on a critical and oft-litigated aspect of *Brady*, merits review.

A. The Prevailing View Correctly Deems Plausible Alternative-Perpetrator Evidence Material Absent Strong Objective Evidence Of Guilt.

Six federal courts of appeals have held that *Brady* requires disclosure of alternative-perpetrator evidence. For example, the Ninth Circuit, sitting *en banc*, held that "[w]ithholding knowledge of a second suspect conflicts with [this Court's] directive that 'the criminal trial, as distinct from the prosecutor's private deliberations, [be preserved] as the chosen forum for ascertaining the truth about criminal accusations.'" *Jernigan*, 492 F.3d at 1056-57 (quoting *Kyles*, 514 U.S. at 440); *see also Williams v. Ryan*, 623 F.3d 1258, 1265 (9th Cir. 2010) ("[E]vidence suggesting an alternate perpetrator is 'classic *Brady* material'"). In the Ninth Circuit's view, this rule was so ingrained as to be "clearly established" one year prior to petitioners' trial--"[a]ny reasonable police officer in 1984 would have understood that evidence potentially inculpating another person fell within *Brady*'s scope." *Carillo v. Cnty. of Los Angeles*, 798 F.3d 1210, 1226 (9th Cir. 2015). The Sixth Circuit has also been emphatic about *Brady*'s reach. It has held that, "[o]n its face, the nondisclosure of the identities of [alternative] suspects" constitutes "an egregious breach of the state's *Brady* obligations." *Gumm*, 775 F.3d at 364 (collecting cases). Decisions in the Second, Fifth, Tenth, and Eleventh Circuits are in accord. *See, e.g.*, *Canales*, 765 F.3d at 575-76; *Banks*, 54 F.3d at 1517-18; *Miller*, 848 F.2d at 1322-23; *Jarrell*, 735 F.2d at 1258. No federal court of appeals has held otherwise.

So, too, state high courts across the country have held that withholding alternative-perpetrator evi-

dence violates the Constitution's fair-trial guarantee that *Brady* is designed to protect. These courts have explained that alternative-suspect evidence is "'bedrock *Brady* material'" which, if suppressed, justifies "'ordering new trials.'" *Floyd*, 902 So.2d at 783-87 (citations omitted); *see also, e.g.*, *Harrington*, 659 N.W.2d at 524-25 (concluding that alternative-suspect evidence would have been "the centerpiece of a consistent theme that the State was prosecuting the wrong person"); *Commonwealth v. Bussell*, 226 S.W.3d 96, 102 (Ky. 2007). This understanding comports with the facts of *Brady* itself, where this Court adopted the Maryland Court of Appeals's holding that suppressing evidence inculpating an alternative perpetrator violated due process. 373 U.S. at 85-87.

Significantly, at both the federal and state levels, courts have explained that alternative-perpetrator evidence is especially important in close cases—such as when inculpatory evidence is weak, or the jury struggles to convict. *See, e.g.*, *Banks*, 54 F.3d at 1521; *Beaman*, 890 N.E.2d at 511-14; *Mazzan v. Warden*, 993 P.2d 25, 38-41 (Nev. 2000). Such evidence is more likely to be material where, for example, there is little or no physical evidence of defendant's guilt. *See, e.g.*, *Gumm*, 775 F.3d at 374; *Williams*, 623 F.3d at 1266; *Floyd*, 902 So.2d at 785-86.

By contrast, in the rare cases in which courts have accepted the government's withholding of plausible alternative-perpetrator evidence, there has often been physical evidence or other strong objective indicia of the defendant's guilt. For example, undisclosed alternative-perpetrator evidence has been deemed immaterial when fingerprint and forensic evidence constituted "substantial objective evidence" of the defendant's guilt. *Beuke*, 537 F.3d at 635-36;

see also Madrid v. Wilson, 590 F. App'x 773, 779 (10th Cir. 2014) ("tenuous evidence" of a "vague description of a possible alternative suspect" was immaterial given "substantial evidence" of defendant's guilt); *Grube*, 995 P.2d at 799 (highlighting physical evidence inculpating defendant).

These decisions make sense in light of *Brady*'s overriding interest in fair trials. A trial is unlikely to be fair if information implicating plausible alternative suspects is withheld. And the disclosure of such information is likely to fundamentally change the course of a trial. In cases lacking inculpatory physical evidence, justice suffers if plausible alternative-perpetrator evidence is considered immaterial to the jury's deliberations.

B. The D.C. Court Of Appeals Stands Alone In Allowing Suppression Of Alternative-Perpetrator Evidence Without Objective Evidence Of Guilt.

In direct contravention of this substantial weight of authority, the D.C. Court of Appeals held that the suppression of evidence pointing to *two* plausible alternative perpetrators was immaterial although no physical evidence inculpated petitioners.

As petitioners recount (Pet. 6-8), the government's case against them was founded upon flimsy circumstantial evidence. The testimony of the prosecution's star witnesses was "riddled with inconsistencies," and corroborating witnesses had "significant credibility problems." Pet. 7. What little physical evidence existed did not inculpate the petitioners, and it was inconsistent with the government's group-attack theory of the case. Petitioners' capacity to mount a defense was irreparably harmed by their

inability to present an alternative-perpetrator narrative. Pet. 8-9. Because prosecutors did not disclose their knowledge of two other suspected assailants, petitioners were deprived of the opportunity to credibly refute the government's theory with evidence that someone else may have committed the crime. Even lacking such information, the jury struggled; it deliberated for an entire week, initially deadlocking over two defendants, acquitting two others, and taking numerous votes to resolve the case. *Ibid.* In light of the fine distinctions between defendants that the jury was obviously making—despite the government's group-attack theory—evidence of an alternative perpetrator would plainly have been material to the jury's deliberations.

Against this backdrop of equivocal evidence, the verdict could not be deemed worthy of confidence after revelations, years later, that the government suppressed information about two different alternative suspects. *See* Pet. 10-12.

- Just three weeks after Mrs. Fuller's murder, a witness told investigators that on the day of the murder James Blue had pulled a woman into an alley and beat and killed her. Blue, who had previously committed crimes with similar characteristics, was released from prison the very day Mrs. Fuller was killed. Shortly before trial, Blue murdered the individual who had implicated him in the Fuller murder.

- Multiple eyewitnesses saw James McMillan fleeing the alley where the crime occurred—with an object hidden under his coat—when the police arrived. Prosecutors were also aware that McMil-

lan had recently robbed and assaulted two other middle-aged women nearby.

It is fanciful to say with confidence that the trial would have unfolded the same way if the government had complied with its *Brady* obligations. "Even if the jury—armed with all of this new evidence—*could* have voted to convict [petitioners]," this Court should "have 'no confidence that it *would* have done so.'" *Wearry v. Cain*, 136 S. Ct. 1002, 1007 (2016) (per curiam) (citation omitted).

Therefore, this Court should grant certiorari. It should reject the D.C. Court of Appeals's aberrational holding that evidence about plausible alternative perpetrators is immaterial even where there is no objective evidence of a defendant's guilt. This Court should give clear guidance to lower courts that alternative-perpetrator evidence is material under *Brady* unless outweighed by substantial objective evidence inculpating a defendant.[3]

III. THE D.C. COURT OF APPEALS'S CATEGORICAL REFUSAL TO CONSIDER POST-CONVICTION INFORMATION IN EVALUATING MATERIALITY CANNOT BE SQUARED WITH *BRADY*.

Two months after James McMillan was released from prison in 1992, he assaulted, sodomized, and murdered another woman in an alley just three blocks from where Mrs. Fuller was found. Pet. 11. Sexual assaults with these characteristics occur in "considerably less than one percent of homicide cas-

---

[3] For the foregoing reasons, the Court should also grant the companion petition for certiorari in *Overton v. United States*, No. 15-1504.

es," which raises the obvious question whether McMillan was singly guilty of both heinous acts, given the high rates of recidivism widely reported in scientific literature. *Ibid.* These post-trial events—shockingly similar to the crime for which petitioners were convicted—confirmed the materiality of the suppressed evidence pointing to McMillan as a suspect in Mrs. Fuller's murder.

Yet the D.C. Court of Appeals disregarded this information. It held that post-conviction events are "not relevant to whether the government violated its *Brady* obligations" and have "no bearing on the question of the materiality of any evidence that the government actually did withhold from the defense." Pet. App. 36a. That bright-line rule is in direct conflict with the holistic evaluation of all information available to the reviewing court that *Brady* demands.[4] It also tempts the government—contrary to this Court's directive—to sit on pre-trial exculpatory information long enough to insulate a questionable verdict against a post-conviction challenge.

A. *Brady*'s Focus On Truth And Justice Supports Considering Post-Conviction Events That Show The Significance Of Evidence Withheld Pre-Trial.

The overarching purpose of *Brady* is "to ensure that a miscarriage of justice does not occur." *Bagley*, 473 U.S. at 675. Likewise, "[t]he proper standard of materiality must reflect our overriding concern with

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[4] The court below was wrong to suggest that *Brady* may be an inappropriate vehicle for relief here. *See* Pet. App. 37a. If prosecutors withheld material, exculpatory evidence, that alone entitles petitioners to a new trial.

the justice of the finding of guilt." *Agurs*, 427 U.S. at 112.

To serve that purpose, *Brady* holds prosecutors to a strict standard, consistent with their "special role" in the "search for truth in criminal trials." *Strickler v. Greene*, 527 U.S. 263, 281 (1999). *Brady* protections are therefore among the most important tools in preventing wrongful convictions. Accordingly, *Brady*'s "constitutional obligation" is not "measured by the moral culpability, or the willfulness, of the prosecutor." *Agurs*, 427 U.S. at 110. *Brady* violations occur "irrespective of the good faith or bad faith of the prosecution," *Brady*, 373 U.S. at 87, because "an inadvertent nondisclosure has the same impact on the fairness of the proceedings as deliberate concealment." *Strickler*, 527 U.S. at 288. It is "the character of the *evidence*, not the character of the *prosecutor*," that matters. *Agurs*, 427 U.S. at 110 (emphases added).

The truth-and-justice-seeking function that animates *Brady* would be severely jeopardized if a reviewing court is not able to take into account *all* of the facts available at the time the conviction is reviewed—including facts arising post-trial—when determining the materiality of withheld information. Any other rule leaves highly probative information regarding "the justice of the finding of guilt" outside the reviewing court's evaluation. *Agurs*, 427 U.S. at 117.

The wrongful conviction of Michael Morton, noted earlier, is a prime example of the importance of considering post-trial information. Mr. Morton was convicted of murdering his wife by beating her to

death in their bed. There were substantial *Brady* violations in his prosecution, including suppression of neighbors' statements about an alternative perpetrator. Critical to understanding the importance of the exculpatory alternative-perpetrator evidence withheld from Mr. Morton is information that came to light post-trial: Years after Mr. Morton's sentence began, a DNA-test of physical evidence—rather than matching Mr. Morton—instead matched someone who was serving a sentence for a similar murder committed two years after Mrs. Morton's death.

Here, the identity of an alternative perpetrator was known to the prosecution before trial but withheld from petitioners. Post-conviction, that very individual later committed a crime displaying hallmark characteristics of the crime for which the petitioners were convicted. Under these circumstances, a reviewing court must be able to consider information about that post-conviction crime in evaluating whether the pre-trial suppression of information about the person who committed it undermines confidence in the correctness of the guilty verdict. It is not for the reviewing court to weigh the effect counsel's use of such information would have had on the jury (whether, for example, counsel could have examined the alternative perpetrator about his criminal history, or questioned the thoroughness of the government's investigation). This Court has emphasized that *Brady* analysis is not a harmless-error test, *Kyles*, 514 U.S. at 435-36, an exhortation the court below flatly ignored when it assessed whether disclosure of the suppressed identity "would have led the jury to doubt *virtually everything*" about the government's case. Pet. App. 54a. Rather, the due pro-

cess violation occurs when the jury deliberates without having had an opportunity to consider the import of the suppressed information. That is when the unfairness of the suppression is realized.

Allowing a reviewing court to consider post-conviction information as part of its materiality inquiry is consistent with this Court's precedents. This Court has directed a reviewing court to assess materiality "in light of the totality of the circumstances." *Bagley*, 473 U.S. at 683; *see also Agurs*, 427 U.S. at 112 & n.21; *Jernigan*, 492 F.3d at 1054 ("[J]udges must 'undertake a careful, balanced evaluation of the nature and strength'" of the withheld exculpatory and available inculpatory information (citation omitted)). It has also recognized the "significant practical difference" between the prosecutor's pre-trial decision to disclose and the judge's post-trial review of that decision. *Agurs*, 427 U.S. at 108. That difference explains why the judge's holistic review should consider information that, although not available to the prosecutor at trial, illuminates the importance of the evidence that the prosecutor *did* possess but did *not* disclose.

This Court has condoned the use of post-trial events to confirm whether undisclosed evidence was material. In *Wood v. Bartholomew*, this Court summarily reversed the circuit court's conclusion that withheld information was material, because the circuit court's analysis "disregarded[] the view of respondent's own trial counsel" that had only been expressed during post-conviction testimony. 516 U.S. 1, 7-8 (1995) (per curiam). This Court noted that the post-trial information represented the "best possible proof" of whether the suppression was material.

Ibid. Other courts have similarly considered post-conviction events as part of *Brady*'s materiality analysis. *See, e.g.*, *Banks*, 54 F.3d at 1520 (evaluating materiality of withheld alternative-perpetrator evidence by considering counsel's post-conviction testimony about how case would have unfolded differently but for suppression); *Harrington*, 659 N.W.2d at 516 (finding post-conviction information "gives context" to the "discussion of the materiality" of withheld evidence); *State ex rel. Griffin v. Denney*, 347 S.W.3d 73, 77-79 (Mo. 2011) (en banc) ("[O]n an alleged *Brady* violation, this Court considers all available evidence uncovered following the trial," including post-trial recantation and third-party confession).

Evaluating materiality in light of post-trial events is also consonant with this Court's history of calibrating a prosecutor's *Brady* obligations to the need to ensure fair trials. In *Agurs*, this Court *presumed*, after the fact, that conscientious prosecutors would recognize material, exculpatory evidence, even if the prosecutor had "actually overlooked it" at the time. 427 U.S. at 110. Later, the Court "disavowed any difference between exculpatory and impeachment evidence," and "abandoned the distinction" between failing to comply with a request for *Brady* material and failing to provide that material voluntarily. *Kyles*, 514 U.S. at 433 (discussing *Bagley*). The Court subsequently imposed a duty on prosecutors "to learn of any favorable evidence known to the others acting on the government's behalf." *Id.* at 437. In each instance, the Court implemented *Brady* without passing judgment on prosecutors. Rather,

the Court aimed to reinforce the fair-trial right embodied in the Due Process Clause.

B. Ignoring Post-Trial Events That Help Demonstrate The Materiality Of Pre-Trial Evidence Encourages Prosecutors To "Tack[] Too Close To The Wind."

This Court has advised against discouraging "[t]he prudence of the careful prosecutor." *Id.* at 440. The decision below does exactly that. It incentivizes prosecutors to amplify their chances of obtaining convictions by withholding exculpatory evidence and gambling that there will be no consequences post-conviction for failing to disclose evidence that, in hindsight, would have mattered to the jury. "By raising the materiality bar impossibly high, the panel invites prosecutors to avert their gaze from exculpatory evidence, secure in the belief that, if it turns up after the defendant has been convicted, judges will dismiss the *Brady* violation as immaterial." *Olsen*, 737 F.3d at 632.

To be sure, a prosecutor's pre-trial assessment of materiality is inherently uncertain. "[T]he significance of an item of evidence can seldom be predicted accurately until the entire record is complete." *Agurs*, 427 U.S. at 108. As a result, a prosecutor will always "be forced to make judgment calls about what would count as favorable evidence, owing to the very fact that the character of a piece of evidence as favorable will often turn on the context of the existing or potential evidentiary record." *Kyles*, 514 U.S. at 438-39; *see also* Daniel S. Medwed, Brady's *Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1558 (2010) (noting prosecutors must make "an artificial, prospective assessment about how particular items of evidence fit within the jigsaw puzzle of a possible

trial"). Even the most conscientious prosecutor runs the risk of having a case unfold unexpectedly—which might portend a *Brady* violation—after electing to withhold certain evidence.

That reality counsels for prudent prosecutors to err on the side of pre-trial disclosure to avoid the prospect of a due process violation down the road. *See Kyles*, 514 U.S. at 439; *Agurs*, 427 U.S. at 108. Disclosing additional information enhances justice. Moreover, robust disclosure obviates the need for a new trial, after evidence has degraded and memories have faded, and avoids the heavy costs of a collateral challenge. In short, a rule encouraging pre-trial disclosure in close cases is the best way to minimize the frequency of future *Brady* challenges and foster finality.

A rule that considers how post-trial information might bear on the significance of suppressed pre-trial facts is a no-lose proposition. Either the information will reinforce that the trial was fair, or it will justify vacating a verdict that is unworthy of confidence—how could considering more information do otherwise? And rejecting the D.C. Court of Appeals's categorical prohibition on considering the implications of post-trial events will not burden prosecutors or the justice system.[5] To the contrary, a far greater toll is exacted by ignoring *Brady*'s policy and increasing the potential that a wrongful conviction will go uncorrected. In this case, it took twenty-six years for petitioners to learn the pre-trial information that was

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[5] Some jurisdictions, such as Texas (after the Morton case), have adopted an open-file policy, which is strong circumstantial evidence that prophylactic disclosure is not unduly burdensome.

known to the government. So long as *Brady*'s materiality requirement remains in place, the state's strong interest in finality will be satisfied no matter how long it takes for petitioners to receive the new, fair trial they are guaranteed under the Constitution. *Bagley*, 473 U.S. at 675 n.7; *accord* Daniel J. Capra, *Access to Exculpatory Evidence: Avoiding the Agurs Problems of Prosecutorial Discretion and Retrospective Review*, 53 FORDHAM L. REV. 391, 414 (1984).

CONCLUSION

For the reasons above and in the petition, the writ of certiorari should be granted and the judgment below should be reversed.

Respectfully submitted,

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July 14, 2016

APPENDIX

APPENDIX

The Innocence Network's member organizations include: the Actual Innocence Clinic at the University of Texas School of Law; After Innocence; Alaska Innocence Project; Arizona Justice Project; California Innocence Project; Center on Wrongful Convictions; Committee for Public Counsel Services Innocence Program; Connecticut Innocence Project/Post-conviction Unit; Duke Center for Criminal Justice & Professional Responsibility; Exoneration Initiative; George C. Cochran Mississippi Innocence Project; Georgia Innocence Project; Griffith University Innocence Project; Hawai'i Innocence Project; Idaho Innocence Project; Illinois Innocence Project; Innocence & Justice Project at the University of New Mexico School of Law; Innocence Project; Innocence Project Argentina; Innocence Project at UVA School of Law; Innocence Project London; Innocence Project of Minnesota; Innocence Project New Orleans; Innocence Project New Zealand; Innocence Project Northwest; Innocence Project of Florida; Innocence Project of Iowa; Innocence Project of Texas; Irish Innocence Project at Griffith College; Italy Innocence Project; Justicia Reinvindicada – Puerto Rico Innocence Project; Kentucky Innocence Project; Knoops' Innocence Project; Life After Innocence; Loyola Law School Project for the Innocent; Michigan Innocence Clinic; Michigan State Appellate Defender Office – Wrongful Conviction Units; Mid-Atlantic Innocence Project; Midwest Innocence Project; Montana Innocence Project; Nebraska Innocence Project; New England Innocence Project; New York Law School Post-Conviction Innocence Clinic; North Carolina Center on Actual Innocence; Northern California Innocence Project; Office of the Ohio Public Defender, Wrongful

Conviction Project; Ohio Innocence Project; Oklahoma Innocence Project; Oregon Innocence Project; Pennsylvania Innocence Project; Reinvestigation Project; Resurrection After Exoneration; Rocky Mountain Innocence Center; Sellenger Centre Criminal Justice Review Project; Taiwan Association for Innocence; The Association in Defence of the Wrongly Convicted; The Israeli Public Defender; Thurgood Marshall School of Law Innocence Project; University of Baltimore Innocence Project Clinic; University of British Columbia Innocence Project at the Allard School of Law; University of Miami Law Innocence Clinic; Wake Forest University Law School Innocence and Justice Clinic; West Virginia Innocence Project; Western Michigan University Cooley Law School Innocence Project; Wisconsin Innocence Project; Witness to Innocence; and Wrongful Conviction Clinic at Indiana University.

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DISTRICT OF COLUMBIA
COURT OF APPEALS

12-CO-1362

CHARLES S. TURNER

v.

UNITED STATES

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
8/7/12	Notice Of Appeal
9/6/12	Initial Order
10/12/12	Order Sua Sponte Consolidating Appeals nos. 12-co-1538, 12-co-1539, 12-co-1540, 12-co-1541, 12-co-1542 and 12-co-1543 with appeal no. 12-co-1362 for all purposes, assigning counsel, appointing counsels, denying as moot appellant's motion in appeal no. 12-co-1540 to appoint counsel and directing the art within 30 days from the date of this order
	* * * * *
11/7/12	Ordered that counsel for appellant in appeal no. 12-C0-1362, shall within 15 days from the date of this order submit the statement regarding transcript, accompanied by a motion for leave to file out of time
	* * * * *

11/9/12	Consolidated Statement Regarding Transcript(s) (for all) (rt ordered/needed) de
11/13/12	Answer/Response to the Court's November 7, 2012 order w/attachments (Appellant - Turner)
11/14/12	Answer/Response to in support of Charles Turner's response to the Court's order of November 7, 2012 (Joint response) (Appellant)
	* * * * *
1/7/13	Record Copies (12-C0-1362)
1/7/13	Record Copies (12-C0-1362)
	* * * * *
1/11/13	Supplemental Record - #1 (Trial Court pleadings) –SEALED
	* * * * *
1/11/13	Record Completed
1/17/13	Record Copies (12-C0-1543)
1/17/13	Record Index (12-C0-1543)
1/24/13	Record Copies {12-C0-1540)
1/24/13	Record Index (12-C0-1540)
2/1/13	Briefing Order
2/27/13	Motion For Extension Of Time to File Appendix, Brief (ALL Appellants) (Joint motion)
3/25/13	GRANT - Order Granting appellants' motion for an extension of time to file the brief and limited appendixes on or before May 13, 2013

4/26/13	Motion To File Excess-Paged Brief (Appellant)
	* * * * *
5/13/13	Brief (Appellant - Smith)
5/13/13	Brief (Appellant-Christopher Turner)
5/13/13	Motion to file certain portions of the appendix under seal (All Appellants)
5/13/13	Brief (Charles Turner, Levy Rouse, Clifton Yarborough, Timothy Catlett) (Appellant)
5/13/13	Motion for extension of time to file amicus briefs (Joint Appellants)
5/13/13	Brief (Appellant-Overton)
6/4/13	Motion To Appear Pro Hac Vice (Amicus-Appellant The Innocence Network)
6/7/13	Motion For Extension Of Time to File Brief (Appellee)
6/13/13	GRANT - Order Granting appellants' motion for an extension of time to file the lodged amicus curiae briefs of Former Law Enforcement Officers, Howard University School of Law criminal justice clinic & civil rights clinic, the false confessor exonerees, former judges and prosecutors, the innocence network, and national assoication of criminal defense lawyers, in support of appellants, graning appellants' motion to file certain portions of the appendix under seal, and granting the motion of Robert B. Humphreys, Esquire, for admission pro hac vice, and the lodged appendix in support of brief of the false confessor exonerees, and granting appellee's motion for an extension

	of time to file the brief on or before September 24, 2013
6/13/13	Brief (Amicus-Appellant The Innocence Network)
6/13/13	Brief (Amicus-Appellant Former Judges and Prosecutors)
6/13/13	Appendix (Volumes I - X)(On behalf of all Appellants) (with eight CDs attached) (Appellant) *****SEALED******
6/13/13	Brief (Amicus-Appellant Howard University School of Law Criminal Justice Clinic)
6/13/13	Brief (Amicus-Appellant The False Confessor Exonerees)
6/13/13	Appendix in support of brief of the False Confessor Exonerees (Amicus-Appellant)
6/13/13	Brief (Amicus Curiae) (National Association of Criminal Defense Lawyers) (appellant)de
6/13/13	Brief (Amicus Curiae Former Law Enforcement Officers) (appellant)de
9/19/13	Motion For Extension Of Time to File Brief (Appellee)
9/30/13	GRANT - Order Granting appellee's motion for an extension of time to file the brief on or before October 24, 2013
	* * * * *
10/22/13	Motion For Extension Of Time to File Brief (Appellee)
10/28/13	GRANT - Order Granting appellee's motion for an extension of time to file the brief on or before November 7, 2013

11/7/13	Motion To File Excess-Paged (Appellee)
	* * * * *
11/19/13	Motion For Extension Of Time to File Reply Brief (Appellant)
11/20/13	ORDER GRANTING APPELLEE'S MOTION and the CLERK SHALL FILE the LODGED BRIEF and GRANTING APPELLANTS' MOTION and the REPLY BRIEF SHALLD BE FILED BY 1/15/14
11/20/13	Brief (Appellee)
	* * * * *
12/4/13	Letter To Counsel/Party Re Future Calendaring
1/8/14	Motion To File Excess-Paged Reply Brief (All Appellants)
	* * * * *
1/16/14	ORDER GRANTING MOTION TO EXCEED the PAGE LIMITS and the CLERK SHALL FILE the lodged REPLY BRIEFS
1/16/14	Reply Brief (Charles Turner, C. Yarborough, L. Rouse, T. Catlett) (Appellant)
1/16/14	Reply Brief (Kelvin D. Smith) (Appellant)
1/16/14	Reply Brief (Russell L. Overton) (Appellant)
1/16/14	Reply Brief (Turner) (Appellant)
	* * * * *
3/24/14	Corrected Motion that oral argument in this matter be heard last (All Appellants)

4/7/14	Order Granting aplts' motion for argument to be heard last.
4/11/14	Order directing response.
4/18/14	Answer/Response to 4/11/14 order of the Court. (Appellant)
4/21/14	Answer/Response concerning length and format of oral argument (Appellee)
4/21/14	Rule 28(k) Citation Of Supplemental Authority (Appellee)
4/24/14	Order re: oral argument presentation (45 minutes each side).
4/29/14	Argued Before Associate Judges Glickman, and Blackburne-Rigsby, and Senior Judge Nebeker. (John S. Williams Esq,. for appellant Clifton F. Yarborough) (Kevin D. Feder Esq.,for appellant Russell L. Overton) (Nicholas P. Coleman Esq.,for appellee).
	* * * * *
6/11/15	Affirmed (OPINION) (Glickman and Blackbume-Rigsby, Associate Judges; and Nebeker, Senior Judge)
	* * * * *
6/12/15	Motion For Extension Of Time to File petition for rehearing (Overton, Rouse, Yarborough Smith Catlett) Other (Appellant)
6/17/15	Ordered that the motion is granted and appellant's petitions for rehearing shall be filed on or before July 15, 2015.
7/15/15	Petition For Rehearing/Rehearing En Banc (Appellant)

7/15/15	Petition For Rehearing/Rehearing En Banc (Christopher D. Turner Joinder of Russell Overton's petition) (Appellant)
7/15/15	Petition For Rehearing/Rehearing En Banc (Russell Overton) (Appellant)
	* * * * *
8/14/15	Ordered that appellee, within 14 days from the date of this order, shall file a response (ten copies) thereto.
8/24/15	Motion For Extension Of Time to File Brief (Appellee)
8/28/15	Ordered that the motion is granted and appellee's response to petition for rehearing or rehearing en banc shall be filed on or before September 28, 2015.
9/23/15	Change Of Address Received From Attorney Berstein & Turner
	* * * * *
1/14/16	Order Denying appellants Yarborough, Smith, Rouse, Turner, Turner, and Catlett's petition for rehearing or rehearing en banc.
1/14/16	Order Denying appellants Overton and Turner's petition for rehearing or rehearing en banc.
1/28/16	Mandate (12-CO-1362)
6/20/16	Copy/Notice Of Petition For Writ Of Certiorari (Appellant-Turner)
6/20/16	Copy/Notice Of Petition For Writ Of Certiorari (Appellant-Overton)

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA

F-8513-84

UNITED STATES

v.

TURNER, CHARLES

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
8/7/12	Appeal Package Filed
8/7/12	Notice of Appeal Filed By Defense Attorney: WICKS, Ms JENIFER (465476)
8/6/12	Order denying defendant's motion to vacate his convictions or in the alternative for a new trial pursuant to D.C. Code §§ 22-4135 and 23-110 signed by Judge Weisberg, entered on docket, and copies mailed to all parties 8/6/12. cmc
6/11/12	Order granting government's unopposed motion for an extension of time to file its proposed findings of fact and conclusions of law and giving the government until June 15, 2012 to file its response signed by Judge Weisberg, entered on docket, and copies mailed to all parties 6/8/12. CMC

6/8/12 Government's Unopposed Motion for an Extention of Time to File Its Proposed Findings of Fact and Conclusions of Law Attorney: OKUN, Mr ROBERT D D (457078)

5/15/12 Exhibit List Filed Exhibit Summary Sent on: 05/15/2012 16:12:33.91

5/15/12 Event Resulted - Release Status: personal recognizance; government completed closing statements; defense rebutted; briefing scheduled for 6/8/12; AUSA Sweeney and Weston; court reporter Jules Jeon. The following event: Post Disposition Motion Hearing scheduled for 05/15/2012 at 9:30 am has been resulted as follows: Result: Hearing Held Judge: WEISBERG, FREDERICK H Location: Courtroom 202 CHARLES TURNER (Defendant (Criminal)); ; Ms JENIFER WICKS (Attorney) on behalf of CHARLES TURNER (Defendant (Criminal)); Judge FREDERICK H WEISBERG

* * * * *

5/14/12 Event Resulted - Release Status: personal recognizance; defense gave closing statements; government closing statement continued; AUSA Sweeney and Weston; court reporter Jules Jeon. The following event: Post Disposition Motion Hearing scheduled for 05/14/2012 at 9:30 am has been resulted as follows: Result: Hearing Held Judge: WEISBERG, FREDERICK H Location: Courtroom 202 CHARLES TURNER (Defendant (Criminal)); ; Ms JENIFER WICKS (Attorney) on behalf of

CHARLES TURNER (Defendant (Criminal)); Judge FREDERICK H WEISBERG

* * * * *

5/11/12 Event Resulted - Release Status: personal recognizance; government case in chief completed; defense rebuttal; AUSA Sweeney and Weston; court reporter Gercha White. The following event: Post Disposition Motion Hearing scheduled for 05/11/2012 at 9:30 am has been resulted as follows: Result: Hearing Held Judge: WEISBERG, FREDERICK H Location: Courtroom 202 CHARLES TURNER (Defendant (Criminal)); ; Ms JENIFER WICKS (Attorney) on behalf of CHARLES TURNER (Defendant (Criminal)); Judge FREDERICK H WEISBERG

* * * * *

5/10/12 Event Resulted - Release Status: personal recognizance; defendant's absence was excused by the court; government case in chief continued; AUSA Sweeney and Weston; court reporter Susan Walker. The following event: Post Disposition Motion Hearing scheduled for 05/10/2012 at 9:30 am has been resulted as follows: Result: Hearing Held Judge: WEISBERG, FREDERICK H Location: Courtroom 202 CHARLES TURNER (Defendant (Criminal)); ; Ms JENIFER WICKS (Attorney) on behalf of CHARLES TURNER Participant(s): Judge FREDERICK H WEISBERG

* * * * *

5/9/12 Event Resulted - Release Status: personal recognizance; government case in chief continued; AUSA Sweeney and Weston; court reporter Rachel Lopez. The following event: Post Disposition Motion Hearing scheduled for 05/09/2012 at 9:30 am has been resulted as follows: Result: Hearing Held Judge: WEISBERG, FREDERICK H Location: Courtroom 202 CHARLES TURNER (Defendant (Criminal)); ; Ms JENIFER WICKS (Attorney) on behalf of CHARLES TURNER (Defendant (Criminal)); Judge FREDERICK H WEISBERG

* * * * *

5/8/12 Event Resulted - Release Status: personal recognizance; government case in chief continued; AUSA Sweeney and W on; court reporter Kellie Humiston. The following event: Post Disposition Motion Hearing scheduled for 05/08/2012 at 10:30 am has been resulted as follows: Result: Hearing Held Judge: WEISBERG, FREDERICK H Location: Courtroom 202 CHARLES TURNER (Defendant (Criminal)); ; Ms JENIFER WICKS (Attorney) on behalf of CHARLES TURNER (Defendant (Criminal)); Judge FREDERICK H WEISBERG

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5/7/12 Event Resulted - Release Status: personal recognizance; government case in chief continued; AUSA Sweeney and Weston; court reporter Kellie Humiston. The following event: Post Disposition Motion Hearing scheduled for 05/07/2012 at

1:00 pm has been resulted as follows: Result: Hearing Held Judge: WEISBERG, FREDERICK H Location: Courtroom 202 CHARLES TURNER (Defendant (Criminal)); ; Ms JENIFER WICKS (Attorney) on behalf of CHARLES TURNER (Defendant (Criminal)); Judge FREDERICK H WEISBERG

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5/3/12 Event Resulted - Release Status: personal recognizance; government case in chief continued; AUSA Sweeney and Weston; court reporter Katy Zamora. The following event: Post Disposition Motion Hearing scheduled for 05/03/2012 at 9:30 am has been resulted as follows: Result: Hearing Held Judge: WEISBERG, FREDERICK H Location: Courtroom 202 CHARLES TURNER (Defendant (Criminal)); ; Ms JENIFER WICKS (Attorney) on behalf of CHARLES TURNER (Defendant (Criminal)); Judge FREDERICK H WEISBERG

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5/2/12 Event Resulted - Release Status: personal recognizance; defense case in chief and rests; government case in chief continued; AUSA Sweeney, Kennedy and Weston; court reporter Barbara DeVico. The following event: Post Disposition Motion Hearing scheduled for 05/02/2012 at 9:30 am has been resulted as follows: Result: Hearing Held Judge: WEISBERG, FREDERICK H Location: Courtroom 202 CHARLES TURNER (Defendant (Criminal)); ; Ms JENIFER WICKS (Attorney) on behalf

of CHARLES TURNER (Defendant (Criminal)); Judge FREDERICK H WEISBERG

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5/1/12 Event Resulted - Release Status: personal recognizance; defense case in chief continued; AUSA Sweeney, Weston, and Kennedy; court reporter Donna Hawkins. The following event: Post Disposition Motion Hearing scheduled for 05/01/2012 at 9:30 am has been resulted as follows: Result: Hearing Held Judge: WEISBERG, FREDERICK H Location: Courtroom 202 CHARLES TURNER (Defendant (Criminal)); ; Ms JENIFER WICKS (Attorney) on behalf of CHARLES TURNER (Defendant (Criminal)); Judge FREDERICK H WEISBERG

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4/30/12 Event Resulted - Release Status: personal recognizance; defense case in chief continued; AUSA James Sweeney and Kacie Weston; court reporter Jackie Wood. The following event: Post Disposition Motion Hearing scheduled for 04/30/2012 at 9:30 am has been resulted as follows: Result: Hearing Held Judge: WEISBERG, FREDERICK H Location: Courtroom 202 CHARLES TURNER (Defendant (Criminal)); ; Ms JENIFER WICKS (Attorney) on behalf of CHARLES TURNER (Defendant (Criminal)); Judge FREDERICK H WEISBERG

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4/27/12 Event Resulted - Release Status: PR; defense case in chief continued; AUSA

Sweeney, Weston and Kennedy (a.m.); court reporter Terri Etekochay. The following event: Post Disposition Motion Hearing scheduled for 04/27/2012 at 9:30 am has been resulted as follows: Result: Hearing Held Judge: WEISBERG, FREDERICK H Location: Courtroom 202 CHARLES TURNER (Defendant (Criminal)); ; Ms JENIFER WICKS (Attorney) on behalf of CHARLES TURNER (Defendant (Criminal)); Judge FREDERICK H WEISBERG

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4/26/12 Event Resulted - Release Status: personal recognizance; defense case in chief continued; AUSA Sweeney and Weston; court reporter Okeemah Henderson. The following event: Post Disposition Motion Hearing scheduled for 04/26/2012 at 2:00 pm has been resulted as follows: Result: Hearing Held Judge: WEISBERG, FREDERICK H Location: Courtroom 202 CHARLES TURNER (Defendant (Criminal)); ; Ms JENIFER WICKS (Attorney) on behalf of CHARLES TURNER (Defendant (Criminal)); Judge FREDERICK H WEISBERG

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4/25/12 Event Resulted - Release Status: personal recognizance; defense case in chief continues; AUSA Sweeney and Weston; court reporter Okeemah Henderson. The following event: Post Disposition Motion Hearing scheduled for 04/25/2012 at 9:30 am has been resulted as follows: Result: Hearing Held Judge: WEISBERG,

FREDERICK H Location: Courtroom 202 CHARLES TURNER (Defendant (Criminal)); ; Ms JENIFER WICKS (Attorney) on behalf of CHARLES TURNER (Defendant (Criminal)); Judge FREDERICK H WEISBERG

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4/24/12 Event Resulted - Release Status: personal recognizance; defense case in chief continues; court reporter Mahalia Davis; AUSA Sweeney, Kennedy, and Weston. The following event: Post Disposition Motion Hearing scheduled for 04/24/2012 at 9:30 am has been resulted as follows: Result: Hearing Held Judge: WEISBERG, FREDERICK H Location: Courtroom 202 CHARLES TURNER (Defendant (Criminal)); ; Ms JENIFER WICKS (Attorney) on behalf of CHARLES TURNER (Defendant (Criminal)); Judge FREDERICK H WEISBERG

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4/23/12 Event Resulted - Release Status: personal recognizance; opening statements given by both parties; defense case in chief continues; court reporter Kristin Gilliam. The following event: Post Disposition Motion Hearing scheduled for 04/23/2012 at 2:00 pm has been resulted as follows: Result: Hearing Held Judge: WEISBERG, FREDERICK H Location: Courtroom 202 CHARLES TURNER (Defendant (Criminal)); ; Ms JENIFER WICKS (Attorney) on behalf of CHARLES TURNER (Defendant (Criminal)); Judge FREDERICK H WEISBERG

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3/9/12 Event Resulted - Release Status: personal recognizance; case continued for post disposition motion hearing previously scheduled. The following event: After Sentencing Hearing scheduled for 03/09/2012 at 12:00 pm has been resulted as follows: Result: Hearing Held Judge: WEISBERG, FREDERICK H Location: Courtroom 202 CHARLES TURNER (Defendant (Criminal)); ; Ms JENIFER WICKS (Attorney) on behalf of CHARLES TURNER (Defendant (Criminal)); Judge FREDERICK H WEISBERG

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2/13/12 Order requiring parties to exchange witness lists and identify expert witnesses by 3/9/12 and to premark, exchange and stipulate to the admissibility of all exhibits before 4/23/12 signed by Judge Weisberg, entered on docket, and copies mailed to all parties 2/13/12. CMC

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9/26/11 Order Granting defendant's Motion for Disclosure of Grand Jury Material signed by Judge Weisberg, entered on the Docket, and copies mailed to all parties 9/26/11. CMC

9/19/11 Joint proposed order for DNA testing signed by Judge Weisberg entered on docket and copies mailed to all parties 9/19/11. CMC

9/19/11 Event Resulted - Release Status: personal recognizance; motion hearing scheduled; defendant refused to sign notice to return

to court; AUSA Weston and Sweeney. The following event: After Sentencing Hearing scheduled for 09/19/2011 at 2:00 pm has been resulted as follows: Result: Hearing Held Judge: WEISBERG, FREDERICK H Location: Courtroom 202 CHARLES TURNER (Defendant (Criminal)); ; Ms JENIFER WICKS (Attorney) on behalf of CHARLES TURNER (Defendant (Criminal)); Judge FREDERICK H WEISBERG

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9/19/11 Event Resulted - Release Status: The following event: After Sentencing Hearing scheduled for 04/23/2012 at 2:00 pm has been resulted as follows: Result: Event Scheduled In Error Judge: WEISBERG, FREDERICK H Location: Courtroom 202

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9/8/11 Event Resulted - Release Status: N/a. The court addresses Atty D'Antuono's motion to withdraw. Court also addresses the matter concerning witnesses that haven't been writ. Government counsel addresses disclosures of experts. Motion on the Yarborough matter is addressed and denied without prejudice. Motion for autopsy is granted and defense counsel to provide protection order for autopsy information. Defense counsel addresses discovery issue, but court does not rule on the matter. The following event: After Sentencing Hearing scheduled for 09/08/2011 at 2:00 pm has been resulted as follows: Result: Hearing Held Judge: WEISBERG, FREDERICK H

Location: Courtroom 202 CHARLES TURNER (Defendant (Criminal)); ; Ms JENIFER WICKS (Attorney) on behalf of CHARLES TURNER (Defendant (Criminal)); Judge FREDERICK H WEISBERG

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7/5/11	Order granting Protective Order signed by Judge Weisberg, mailed to parties, and entered on the docket on 7/5/11. ESC
7/1/11	Government's Unopposed Motion for Protective Order Regarding Certain Crime Scene Photographs Attorney: MACHEN, Mr RONALD C (447889)
6/23/11	Order granting Motion to Disclose and Protective Order signed by Judge Weisberg, mailed to parties, and entered on the docket on 6/23/11. ESC
6/20/11	Government's Unopposed Motion for Authorization to Disclose Records and for Protective Orders Attorney: OKUN, Mr ROBERT D D (457078)
5/25/11	Joint Order for DNA Testing signed by Judge Weisberg, mailed to parties, and entered on the docket on 5/25/11.
5/25/11	Protective Orders, granting "Government's Unopposed Motion for Orders Authorizing Disclosure of Discovery Related Documents and for Protective Orders" and authorizing disclosure, signed by Judge Weisberg, mailed to parties, and entered on the docket on 5/25/11. ESC
5/20/11	Government's Unopposed Motion for Orders Authorizing Disclosure of Discovery

Related Documents and for Protective Orders Filed. Attorney: SWEENEY, Mr JAMES S (427217)

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5/18/11 Event Resulted - Release Status: N/A. AUSA Sweeney and Restin were present. Hearing held to discuss discovery issues. The following event: After Sentencing Hearing scheduled for 05/18/2011 at 2:00 pm has been resulted as follows: Result: Hearing Held Judge: WEISBERG, FREDERICK H Location: Courtroom 202 Participant(s): Judge FREDERICK H WEISBERG

5/3/11 Government's Notice of Withdrawal of Its Motion to Compel Discovery Attorney: SWEENEY, Mr JAMES S (427217)

5/3/11 Order Granting In Part Defendants' Motion for DNA Testing signed by Judge Weisberg, mailed to parties, and entered on docket on 5/3/11. ESC

4/29/11 United States' response to Defendants' Motions for discovery and for Disclosure of Grand Jury Material Attorney: MACHEN, Mr RONALD C C (447889)

4/21/11 United States' Response to Defendants' Motion for Post-Conviction DNA Testing, Pursuant to D.C. Code 22-4133 and Rule 6(A) of the Rules Governing D.C. Code 23-110 Procedures Attorney: OKUN, Mr ROBERT D D (457078)

4/7/11 Event Resulted - Release Status: N/A. Hearing held, continued for further hearing. The following event: After Sentencing Hearing scheduled for 04/07/2011 at 2:00 pm has been resulted as follows: Result: Hearing Held Judge: WEISBERG, FREDERICK H Location: Courtroom 202 CHARLES TURNER (Defendant (Criminal)); ; Ms JENIFER WICKS (Attorney) on behalf of CHARLES TURNER Participant(s): Judge FREDERICK H WEISBERG

* * * * *

4/5/11 Government's Motion to Compel Discovery Attorney: SWEENEY, Mr JAMES S (427217)

3/7/11 Protective Order signed by Judge Weisberg on 3/4/11, and mailed to parties and entered on the docket on 3/7/11. ESC

3/1/11 Government's Motion for a Protective Order Attorney: SNOW, Ms MARY A (379757)

1/13/11 Event Resulted - Release Status: : N/A, defense counsel present, case continued for further hearing. The following event: After Sentencing Hearing scheduled for 01/13/2011 at 2:00 pm has been resulted as follows: Result: Hearing Held Judge: WEISBERG, FREDERICK H Location: Courtroom 202 CHARLES TURNER (Defendant (Criminal)); ; Ms JENIFER WICKS (Attorney) on behalf of CHARLES TURNER Participant(s): Judge FREDERICK H WEISBERG

* * * * *

1/8/11	Event Resulted - Release Status: The following event: Status Hearing scheduled for 01/13/2011 at 2:00 pm has been resulted as follows: Result: Hearing Vacated Judge: WEISBERG, FREDERICK H Location: Courtroom 202

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12/15/10	Case Transferred to Another Judge The judge was changed from RIGSBY, ROBERT R to WEISBERG, FREDERICK H
12/15/10	Order certifying the case to Judge Frederick H. Weisberg. Entered on the Docket and mailed 12/15/10. mcd
11/12/10	Order Denying Defendant's "Authorities in Support of Request for Presence of Mr. Turner at Status Hearing" Entered on the Docket Signed by Judge Robert R. Rigsby on 11/12/10. Docketed and sent from chambers on 11/12/10. sna

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10/4/10	Case Transferred to Another Judge The judge was changed from SCOTT, ROBERT M to RIGSBY, ROBERT R
9/13/10	Motion for Discovery Attorney: WICKS, Ms JENIFER (465476)
9/13/10	Motion to Vacate Conviction and Dismiss with Prejudice or in the Alternative for a New Trial Attorney: WICKS, Ms JENIFER (465476)

8/23/10	Attorney Appointed Attorney WICKS, Ms JENIFER representing Defendant (Criminal) TURNER, CHARLES as of 08/23/2010
2/26/92	Judgment and Commitment Order
1/24/92	JUDGE: SCOTT , ROBERT DEFENSE ATTY: , COMMENT: AN APPEAL THAT WAS FILED ON APR 13,90 WAS AFFIRMED ON 1/24/92
2/4/86	Judgment and Commitment Order

[EXCERPTS FROM JOINT EXHIBIT 2 FROM POST-CONVICTION PROCEEDING]

* * *

Statements: 8th and H Crew

* * *

Clayton Coleman – Said that he came from school 3:30, that he filled out an application for a job or Marriott, read the paper, got dressed, went to Murray Steak for his mother. It was just before dark or getting dark. He saw Eddie Davis and Juan Wigfall coming or appeared to be coming out of Reggie Lucas' house. They started going toward 9th & I, there he saw them meet Sharon Sinclair. He heard Sharon Sinclair say, "No, No". She kind of looked shocked and then she went toward her house. Eddie and Warren went down toward H Street down 9th. He caught up with them and was told by them that there was a body in the alley in Russell's old garage. He entered the (garage) the alley, went toward the garage at about time the police were arriving, he remembered a female police officer. He got into the garage he says, just before the police officer did when Russell's sister, we think Jackie Tiley, pointed the police officer, (to the police officer) where the body was and he said that he saw the body lying in the corner. After that the police had everybody get out of the alley. He went to Murray's Steak with Eddie & Warren. Later saw Warren & Eddie on the Brooks' porch right off the alley. He also said that he saw two people in the alley say something to Jackie Tiley. He couldn't tell whether she said anything back to them. He thought he might be able to recognize one of them. He looked thru the photos as people he knew but did see anyone in the photographs he recognize as being one of the people he saw in the alley.

8/23/10	Attorney Appointed Attorney WICKS, Ms JENIFER representing Defendant (Criminal) TURNER, CHARLES as of 08/23/2010
2/26/92	Judgment and Commitment Order
1/24/92	JUDGE: SCOTT , ROBERT DEFENSE ATTY: , COMMENT: AN APPEAL THAT WAS FILED ON APR 13,90 WAS AFFIRMED ON 1/24/92
2/4/86	Judgment and Commitment Order

[EXCERPTS FROM JOINT EXHIBIT 2 FROM POST-CONVICTION PROCEEDING]

* * *

Statements: 8th and H Crew

* * *

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* * *

Samuel Edwards – Drinking with Watts and Luchie, etc. Does not recall this particular day. Goes to Drink w/ them alot. Leaves at 6pm usually.

* * *

William Freeman, II – Worked with James Robinson (the vendor on the corner ofs 8th & H). Was working that day. Gave a statement to the police later on. He is the one who went back to go to the bathroom and discovered Mrs. Fuller's body. Told us that afterwards he came back out of the alley, told Mr. Robinson and Jackie Tylie (who was also with Mr. Robinson) about what he'd seen. Jackie and Mr. Robinson went back into the alley or about five minutes, both came out, Jackie called the police and said they telephone across the street from the bank. Later, moments later Jackie and William Freeman went back into the alley to wait for the police and when they went back there just at about the same time the police arrived, they saw two young men who when they approached, ran back from, in the direction that they were coming, which was down the alley toward "I" Street. Mr. Freeman looked at the photo album and identified a number of pictures as people that he had seen and knew. Specifically, he identified the picture of James McMullian as the person, (one of the people he saw in the alley), and a second picture of Gerald Merkeson as the second person he'd seen in the alley. That's Merkeson . . . M-e-r-k-e-r-s-o-n? (Response – Yeah). All the other pictures he knows a lot of them or he'd seen a lot of them he said, but didn't recall seeing anybody out there that day. He has not worked in the area that long, in fact this was his first week, might have been his first couple of days working at that stand.

* * *

Willie Lucci – Jackie Watts' niece said he was staying with his sister, Jackie's mother, and that that evening, evening of the murder, Toochie, whoes real name is Ronald Murphy, came over, and he, Toochie, Jackie Watts and Michael Jackson their brother-in-law, went to buy some liquor. He knows it was 5:00 or 5:30 because that's when Toochie gets off work. They walked throught the alley from 9th Street toward 8th Street and on the way to Family Liquors, and as they passed the garage he said that he heard several groans. He remembers the doors to the garage being closed. They bought the liquor at Family's, stayed in the park for a while, heard about the murder at their house later on.

* * *

Ronald Murphy – Is someone who was with Jackie Watts, and a number of other people, Willie [illegible]ie, Sam Edwards, Mike Jackson. They, at about 5:30-5:45 went through the alley pass the garage and heard some kind of moaning but didn't look in the garage. They went to the liquor store, pass back through the alley, didn't hear anything. Ronald Murphy is also the person who bought Mrs. Fuller's ring from some unidentified guy for $5 outside of Friendly Liquor Store on H Street. He has not been shown any photographs.

Kay Porter – Originally Kay Porter was said to have heard Calvin Alston's statements to Carey Ellerbe. The night that Carey came in and talk to the detectives admitted that she also heard the conversation. When she came in to talk to us she told us that she knew Snotrag, that she'd heard several conversations with "Snotrag", two that she can recall specifically in which she asked his him whether he killed the lady, and he admitted to her that Levi killed the lady and

stuck the pole up the lady; that he and Hollywood just kicked her. The day she came in to talk to us she admitted to detective Sanchez, and myself that she did not recall being in the car and hearing Calvin Alston say anything about the killing or a robbery, but said that she did hear a conversation somewhere where someone admitted taking money but not necessarily having anything to do with this case. She didn't know why Carey Ellerbe put her in this thing but she just went alone with what Carey said.

* * *

Charnita Speed – Is a friend of James McMillian's. She said was home from school at about 3:15, took a nap. Some time around 6:00 she went to People's to buy some personal items. She passed by the vendor (who she calls "Boss Man") on the corner os 8th & H, and overheard a young lady, Jackie Tylie, telling "Boss Man" about finding a body in the alley. Were talking about finding a body in the alley, and she went with "Boss Man" into the alley. Saw him go into the garage, saw the body. Came out, heard him tell Jackie Tylie to go call the police. Waited for awhile. At some point she went into People's before the police arrived. When she came out, she saw Juan Wigfall walking toward 8th Street toward from 9th Street. She told him about the body in the alley. He didn't believe her. Together they went back into the alley. The police were arriving from the other side and she says that she saw at that time 2 people coming from I Street. She identified one of them as James McMillian, who she knows very well and picked the picture out of the photo book saying, "that, that's the dudes that was with him. The picture is a picture of Gerald Merkeson, #16 in the photo book. She says she started to call out to James but didn't say anything. He ran off as soon as he saw the police were

arriving. He appared to be putting something under his shirt or under his shirt ... or under ... or appeared to have something under his coat and his friend appeared to be stuffing some papers under his shirt. She saw James later on but she didn't talk to him about it.

* * *

Jackie Tylie – Ms. Tylie was with the vendors when they discovered the body and said that she went back with "Boss Man" to see the body and later went back with Mr. Freeman to see the body. On the way back with Mr. Freeman, she recalls seeing James McMillian whom she knew and also ... she also says that she saw Charles Sinclair and Sharon Sinclair. We need to bring her back as to times. And she recall seeing some people leave the alley and split up. Mentions a few names, but includes a lot of people no one else has mentioned being a part of the group. We need to bring her back in and straighten that out.

* * *

Jacqueline Watts – Ms. Watts along with Willie Lucci, Ronald Murphy, Michael Jackson and Samuel Edwards walked through the alley to go to the Liquor Store the day of the murder and Jackie Watts is the one who heard some moans, but they didn't look in the garage. She also is the person that Ronald Murphy bought the ring for and is the one who called the police and told them that she had one of Mrs. Fuller's rings. She knew that it might be one of Mrs. Fuller's rings after Mrs. Fuller's sister came and looked at it.

* * *

James McMillian – James McMillian was identified by Charnita Speed, a girlfriend of his, as being present in

the alley just when the police arrived, acting suspiciously, having something under his coat. We never talked to James McMillain because his lawyer said he didn't want to talk to us, wouldn't talk to us. He was being sentenced at the time, and we may still bring him up.

* * *

K St NE
K St NE
K St NE
Catherine Fuller House
923
7th St NE
8th St NE
9th St NE
10th St NE
I St NE
I St NE
7th St NE
8th St NE
9th St NE
10th St NE
802
Family Liquor Store
H St NE
H St NE
H St NE
8th & H STREET
PARK
EXHIBIT
JX010

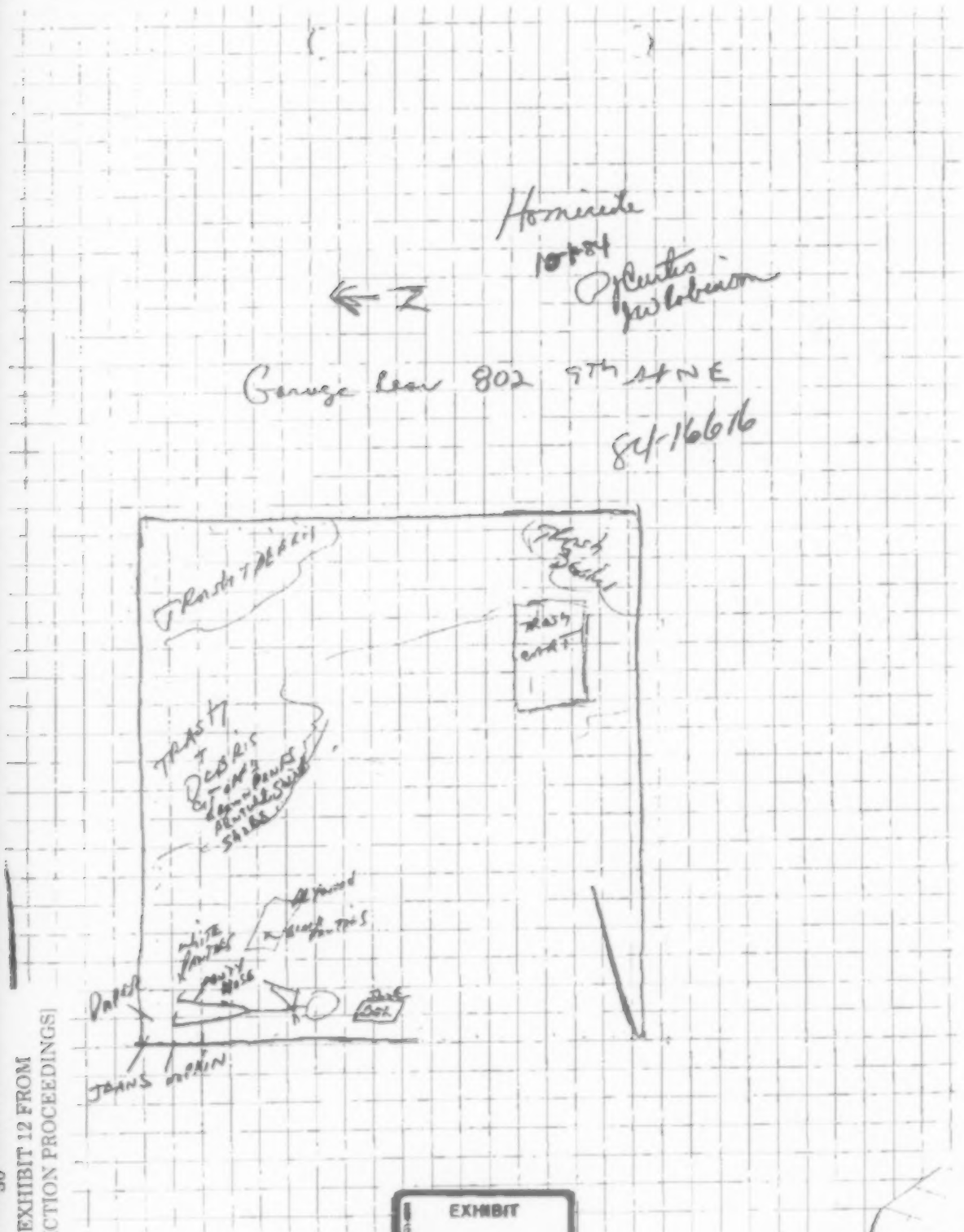
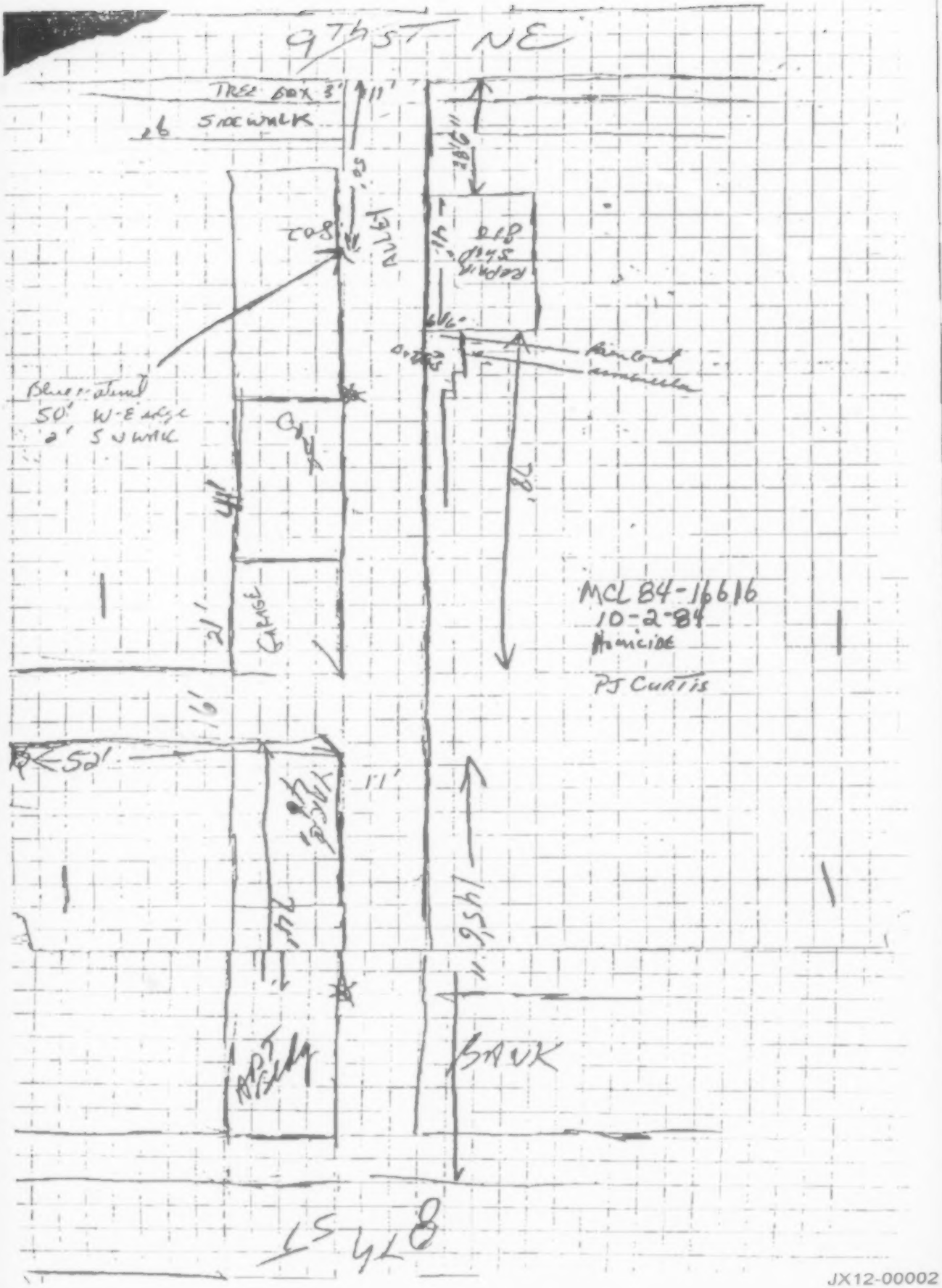


EXHIBIT
JX012

JX12-00001

A1187

[JOINT EXHIBIT 12 FROM POST-CONVICTION PROCEEDINGS]



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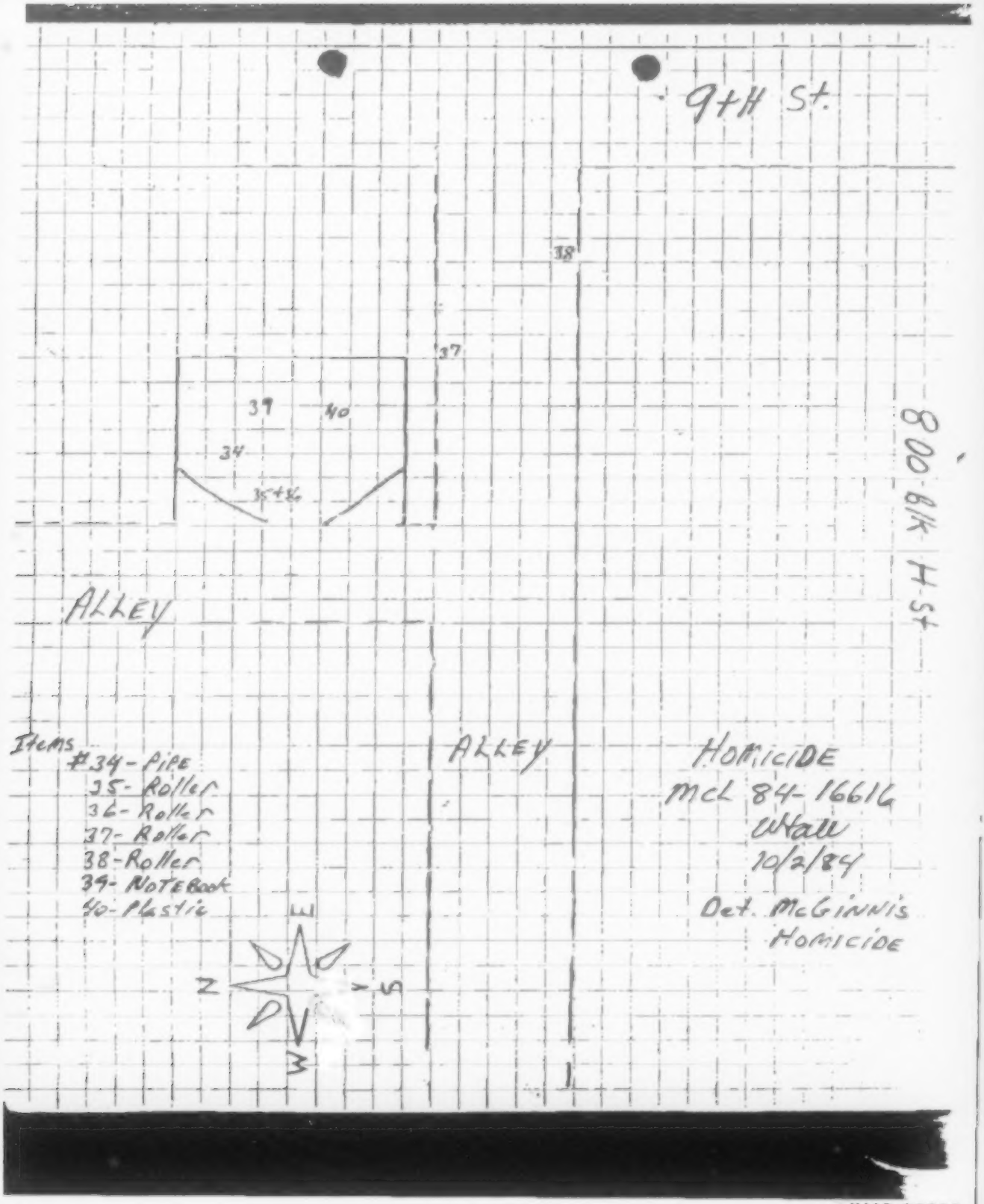
A1188



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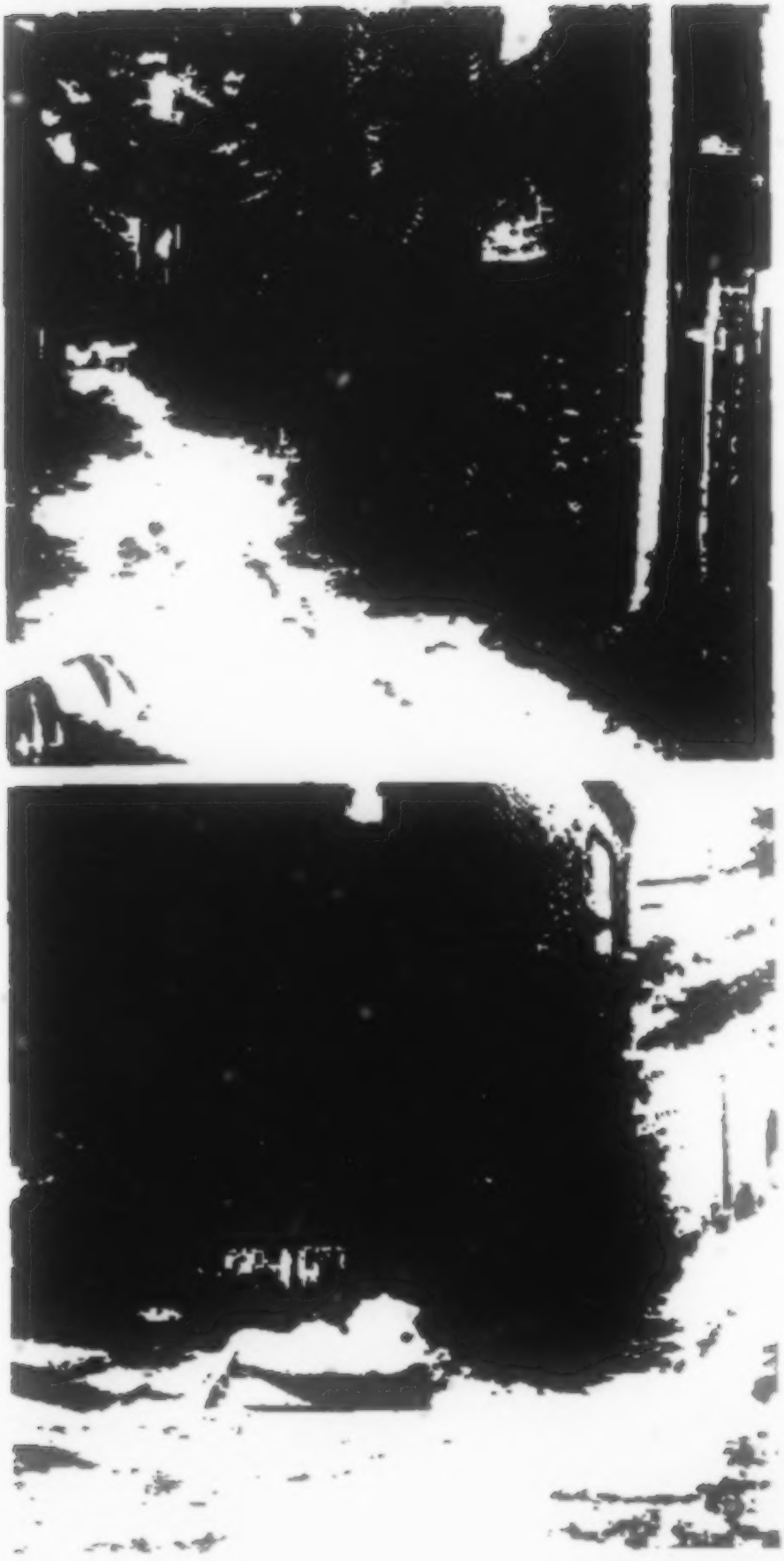
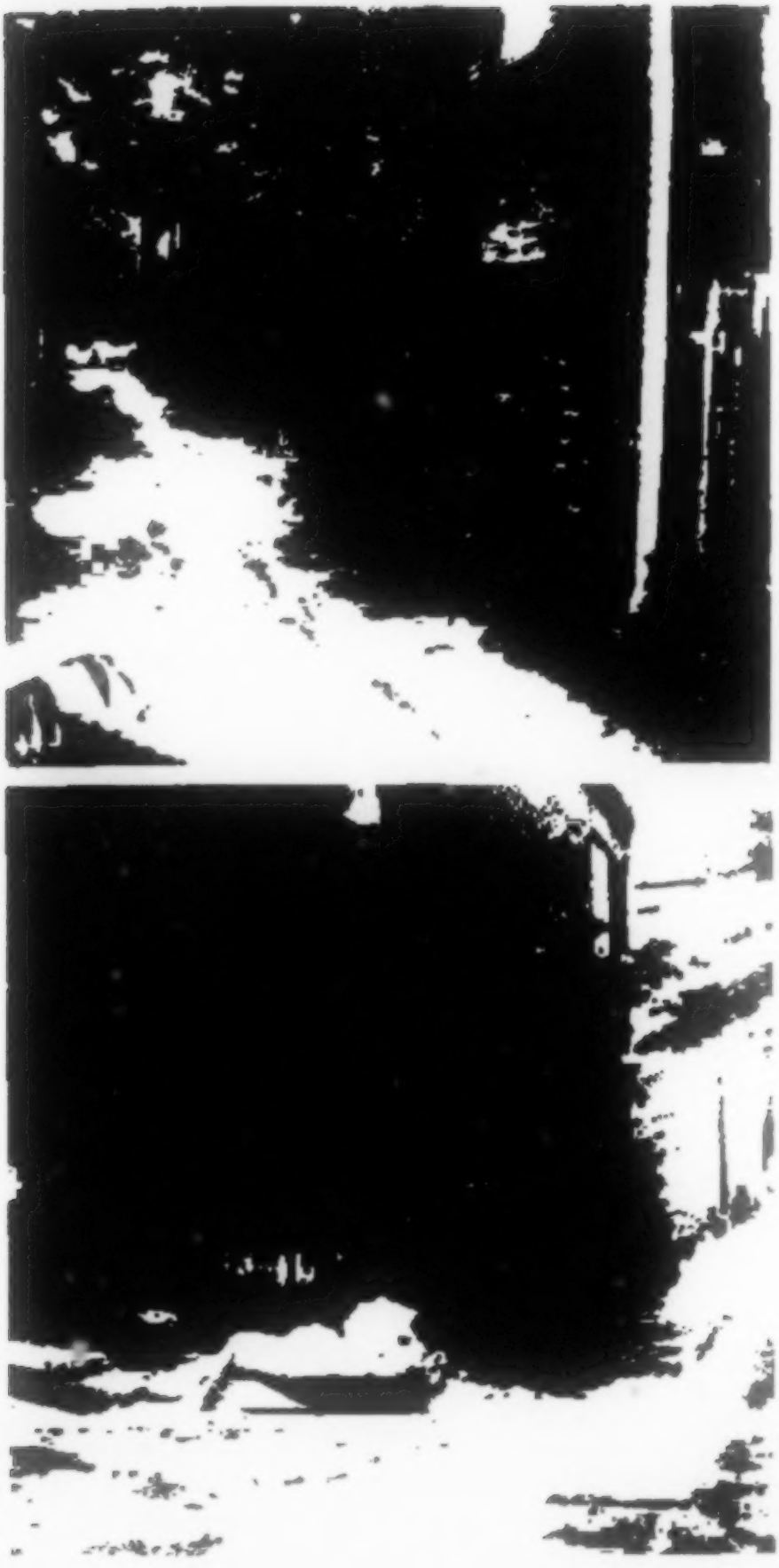
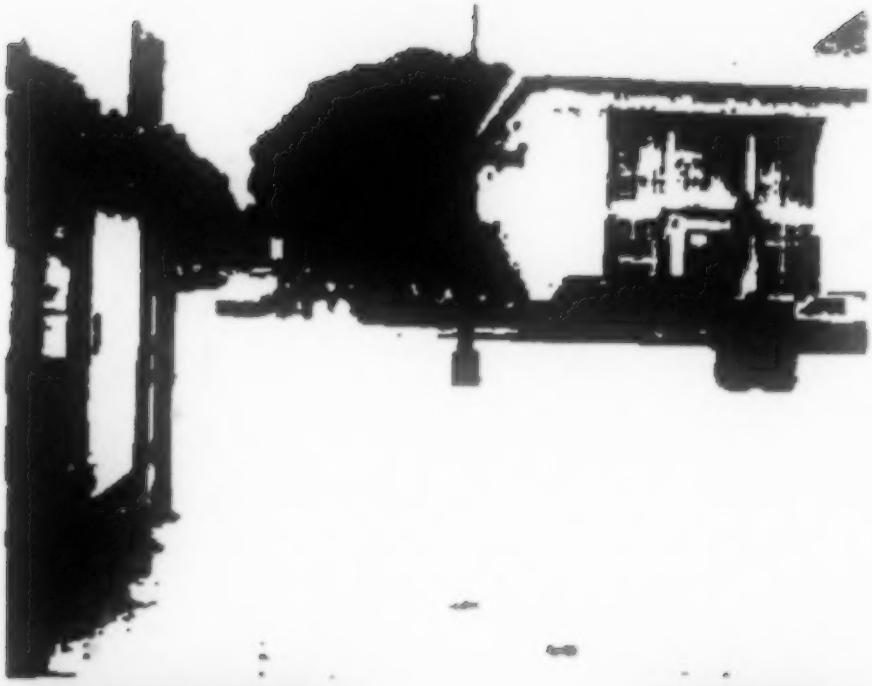
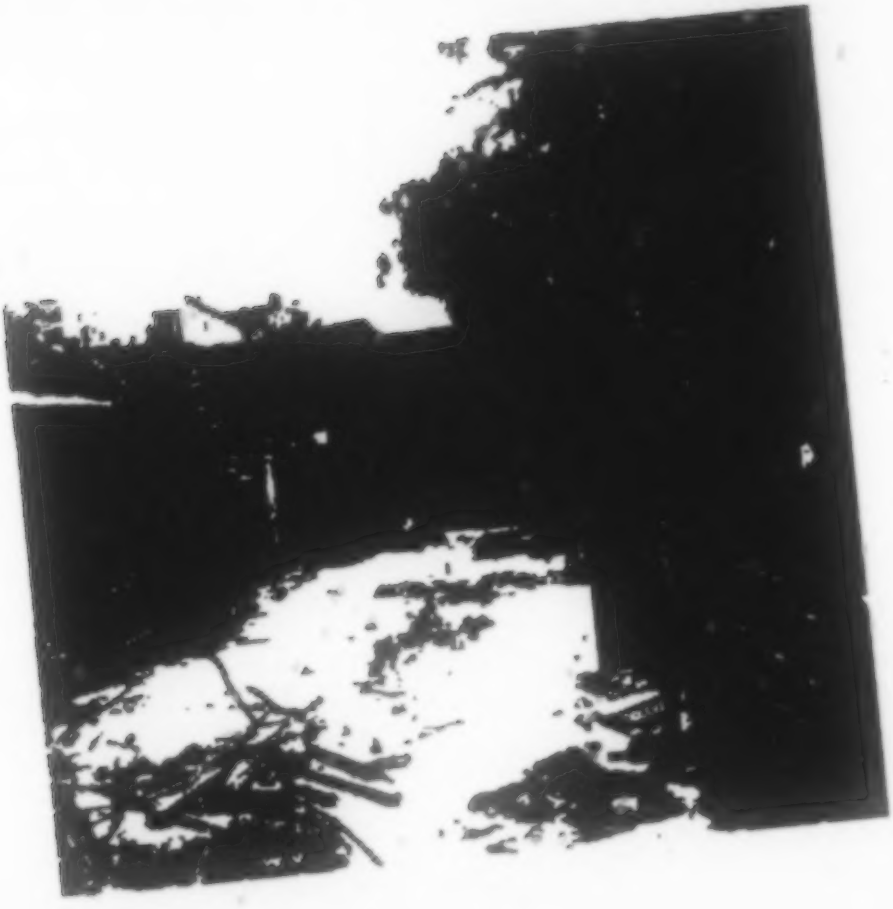
[JOINT EXHIBIT 16 FROM
POST-CONVICTION PROCEEDINGS]

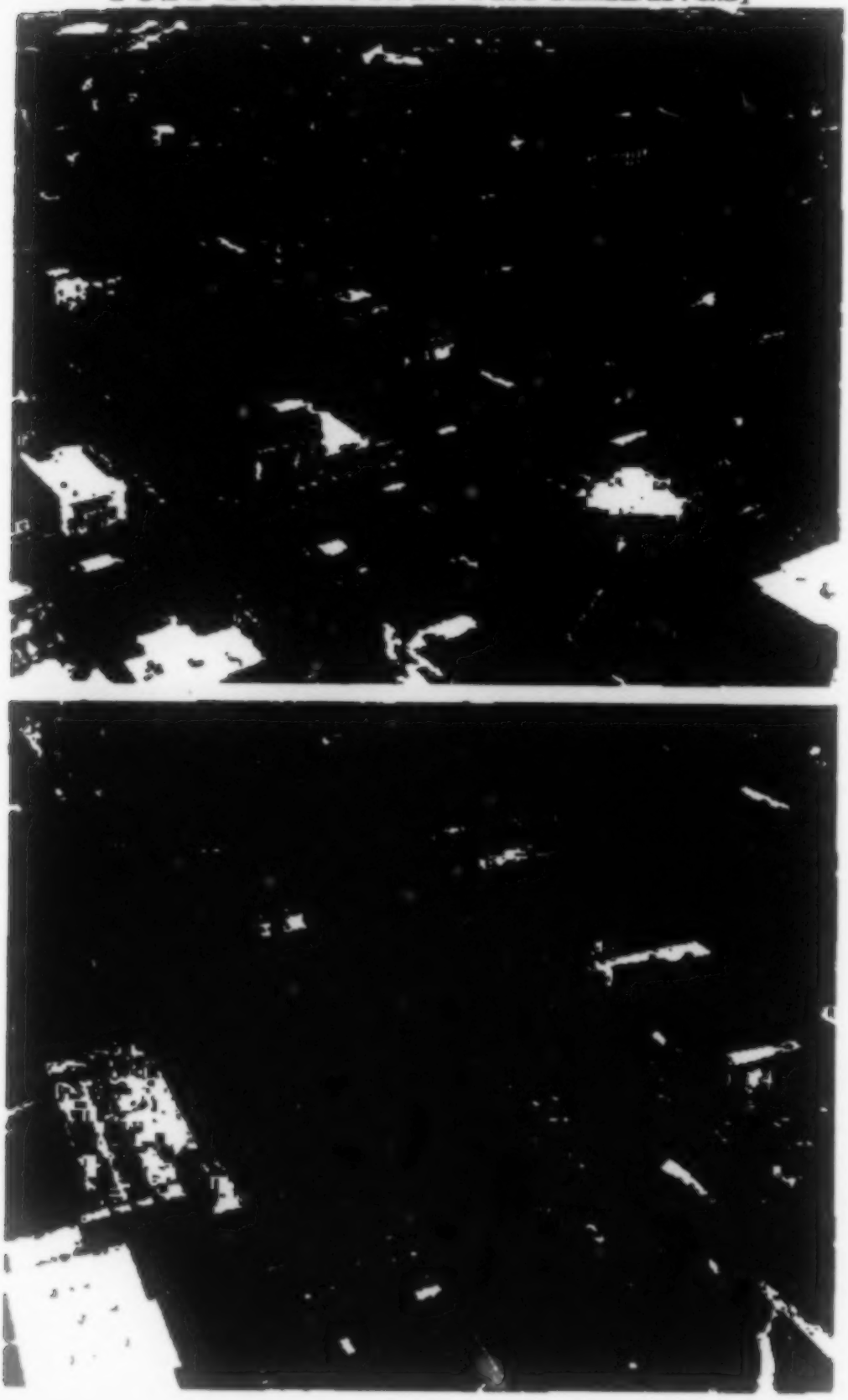


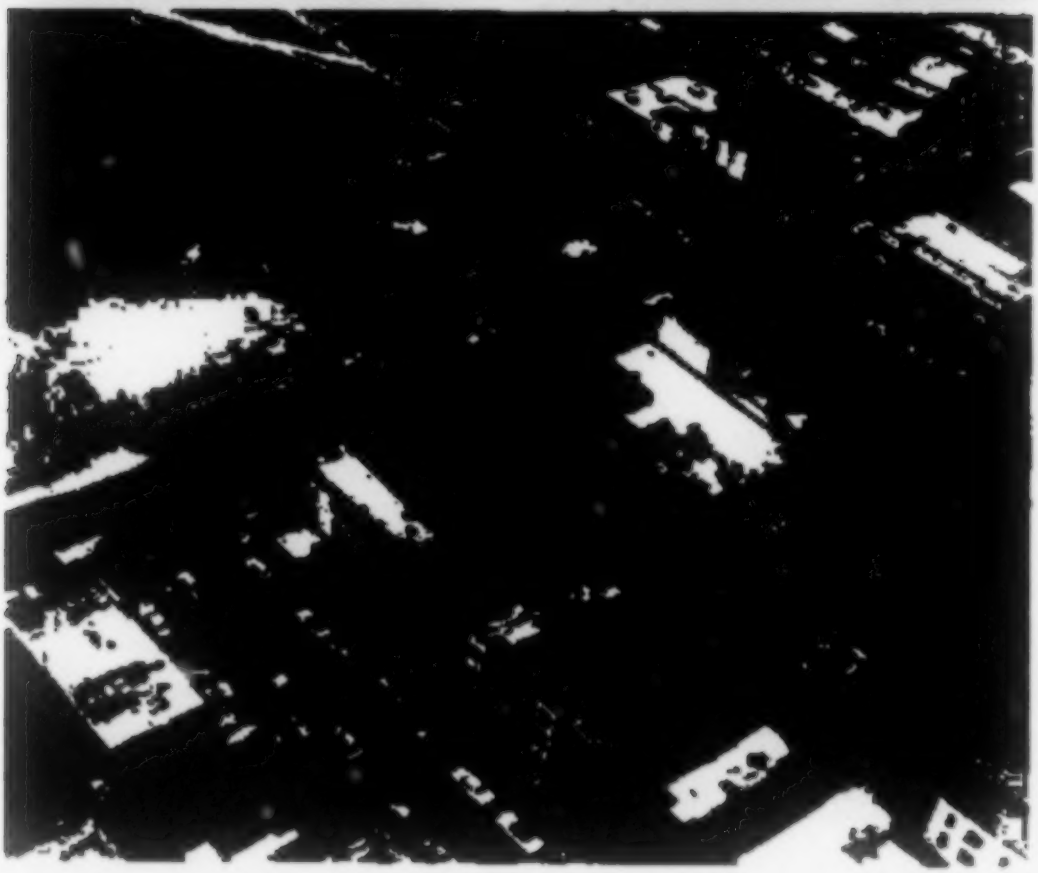


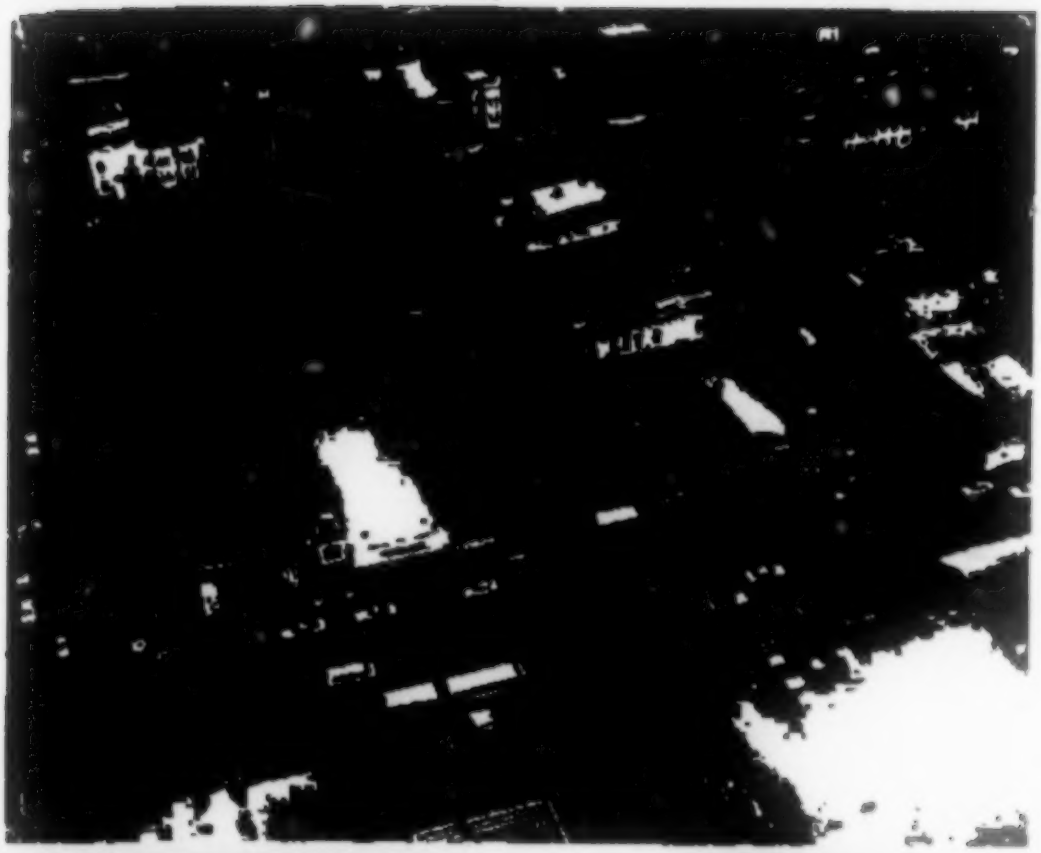


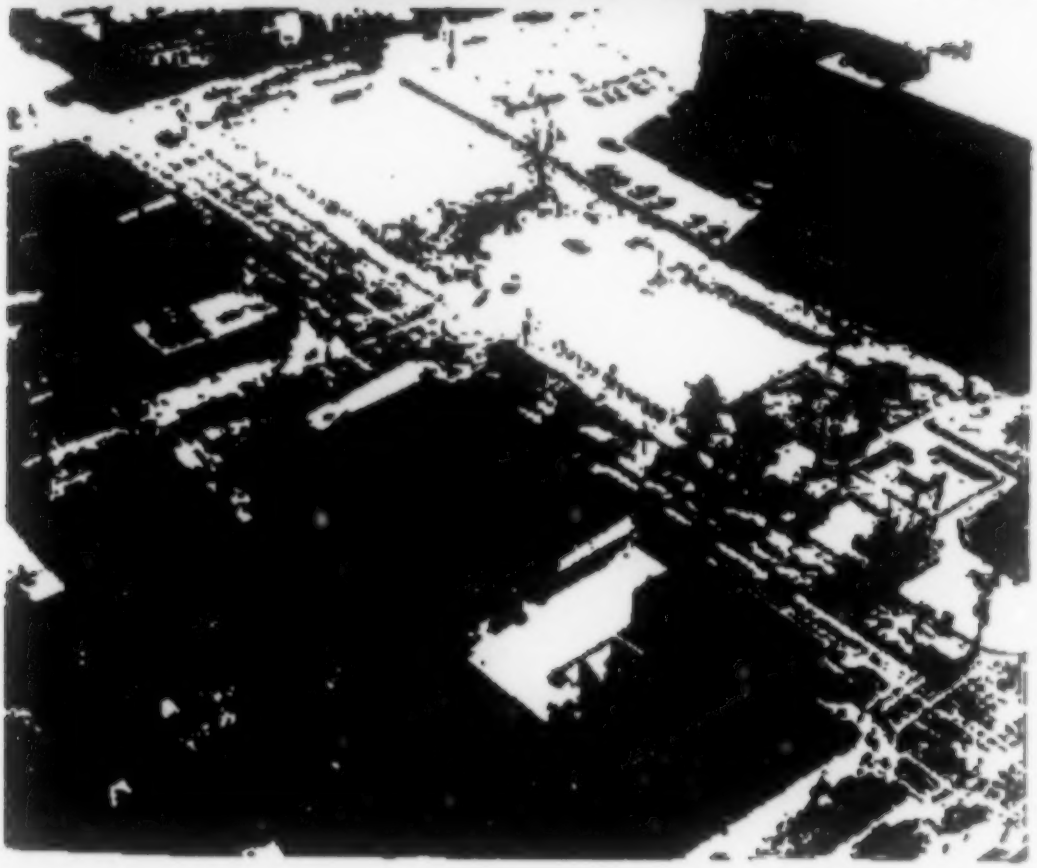


[JOINT EXHIBIT 17 FROM
POST-CONVICTION PROCEEDINGS]









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METROPOLITAN POLICE DEPARTMENT
WASHINGTON, D.C.
COMPLAINANT/WITNESS STATEMENT

P.D. 119 12/73

1. COMPLAINT NO.

2. NATURE OF INVESTIGATION: HOMICIDE

3. UNIT FILE NO.: HO# 84-

4. STATEMENT OF: (Last, First, Middle) Ronald Monroe Murphy SS# [redacted]

5. DOB: [redacted]

6. SEX: M

7. HOME ADDRESS: [redacted]

8. HOME PHONE: [redacted]

9. EMPLOYMENT (Occupation and Location): Carson Construction Co., 10605 Concord St., Kensington Md, 20895

10. BUSINESS PHONE: [redacted]

11. LOCATION STATEMENT TAKEN: Homicide Br. Office

12. NAME OF OFFICER TAKING STATEMENT (If other than block 18 include signature): Det. P.T. McGinnis

13. DATE/TIME STARTED: k0-3-84, 7:40 PM

14. STATEMENT

Q. Mr. Murphy, please tell me in your own words about a ring that you gave your girlfriend Jackie Watts?
A. OK after I got from work I went to the liquor store, thsts Friendly Liquor Store at 8th and H St. N.E. So this guy came up and he was talking to Vivian at first, then she couldnt buy it so she came to me and asked if I wanted to buy a ring and then the guy came up and asked me if I wanted to buy a ring for $100.00 and I told I didnt have no hundred dollars. Then he said give me $15.00 and I told him not to bother me. I went on and bought my liquor and then the guy said "man give me $5.00" and I did because Five dollars was a good price. After that we just walked back to Jackie's house.

Q. Who was with you the night you bought the ring?
A. Just me and Vivian , Jackie's sister.

Q. About what time was it when you went to the liquor store and ended up buying the ring?
A. Between 8:15 and 8:45 PM, that was my second trip to the store, we had went through that alley earlier.

Q. What alley are you refering to that you went through earlier?
A. The alley between 9th and 8th St. .

Q. You said the we went through the alley earlier, who was with you at that time?
A. Jackie, her uncle Willie Luchie, and Michael Jackson.

Q. Did you see or hear anyone or anything unusual when you four went through the alley?
A. Now I didnt but Jackie said she did, she said that she heard something like someone grown or something like that.

Q. Did she say where the noise came from?
A. Charles looked back at the garage, so did Willie, but they didnt go back, they said that there use to be a car in that garage.

Q. Who is Charles, you didnt mention him before/
A. I forgot, Charles Bowman was with us also it was us four and Jackie.

R.M.
Statement ... by Criminal F...

15. I HAVE READ THIS STATEMENT GIVEN BY ME OR HAVE HAD IT READ TO ME. I FULLY UNDERSTAND IT AND CERTIFY THAT IT IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND RECOLLECTION.

Ronald Murphy
SIGNATURE OF PERSON GIVING STATEMENT

16. DATE/TIME ENDED

17. PAGE 1 OF 1 PAGES

18. OFFICER OBTAINING THE SIGNATURE IN BLOCK 15:

19. PERSON WITNESSING THE SIGNATURE IN BLOCK 15:

(Name and Signature)

EXHIBIT
JX019

JX19-00001

A1240

53
[JOINT EXHIBIT 19 FROM POST-CONVICTION PROCEEDINGS]

METROPOLITAN POLICE DEPARTMENT
WASHINGTON, D.C.
COMPLAINANT/WITNESS STATEMENT

PD 119 12/73

1. COMPLAINT NO.	
2. NATURE OF INVESTIGATION: HOMICIDE INVESTIGATION	3. UNIT FILE NO.: HOF 84-
4. STATEMENT OF: (Last, First, Middle) Ronald Murphy	5. DOB / 6. SEX
7. HOME ADDRESS	8. HOME PHONE
9. EMPLOYMENT (Occupation and Location)	10. BUSINESS PHONE
11. LOCATION STATEMENT TAKEN: Hom. Br. Off.	12. NAME OF OFFICER TAKING STATEMENT (If other than block 15 include signature): Det. P.T. McGinnis / 13. DATE/TIME STARTED

14. STATEMENT

Q. Did you see anyone in the alley when you four plus Jackie went through?
A. No.

Q. About what time was that?
A. Lets see I left the job, stopped by the apartment and checked the mail, Id say 5:30 or quarter to six.

Q. What did the man look like that sold you the ring?
A. All I can say is that he was tall. slim build, light complexion, I couldnt tell you what he had on. He did have a girl with him she was about the same complexion.

Q. How old do you think the guy was?
A. I might be older than he was he was about 29 to 32 years old but now real young. He had a rap to him like he had done that type of thing before.

Q. What else can you remember about the girl he had with him?
A. She was slender built, she was black, both of them was black, her hair was was curled up on her head.

Q. Do you remember what the girl had on?
A. No.

Q. Do you know who else was in the liquor store when the man ~~sold~~ sold you the ring?
A. There was quite a few people in the store, but he did all his talking on the street.
Q. Do you mean that the man never went in the Liquor Store?
A. Yes he went inside the liquor store he could have talked to Vivian inside the store but I didnt talk to him until I got out the store.

Q. Which was did the man walk after he sold you the ring?
A. Me and Vivian left him and that girl standing right there at the corner by the bank at 8th and H St.

Q. Did the man say anything about where he got the ring or why he was selling the ring?
A. I cant remember if he said anything like that or not.

RM "The Making of a ... Statement is ... by Criminal Penalties"

Q. did the man have anyother jewlery to offer to sell?
A. No all he showed me was the ring.

15. I HAVE READ THIS STATEMENT GIVEN BY ME OR HAVE HAD IT READ TO ME. I FULLY UNDERSTAND IT AND CERTIFY THAT IT IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND RECOLLECTION.

Ronald Murphy
SIGNATURE OF PERSON GIVING STATEMENT

16. DATE/TIME ENDED

17. PAGE 2 OF 3 PAGES

18. OFFICER OBTAINING THE SIGNATURE IN BLOCK 15:

19. PERSON WITNESSING THE SIGNATURE IN BLOCK 15: (Name and Department)

JX19-00002

A1241

METROPOLITAN POLICE DEPARTMENT
WASHINGTON, D.C.
COMPLAINANT/WITNESS STATEMENT

P.D. 119 12/73

1. COMPLAINT NO.

2. NATURE OF INVESTIGATION
HOMICIDE INVESTIGATION

3. UNIT FILE NO.

4. STATEMENT OF: (Last, First, Middle)
Ronald Murphy

5. DOB

6. SEX

7. HOME ADDRESS

8. HOME PHONE

9. EMPLOYMENT (Occupation and Location)

10. BUSINESS PHONE

11. LOCATION STATEMENT TAKEN
Hom. Br. Off.

12. NAME OF OFFICER TAKING STATEMENT (If other than block 18 include signature)
Det. P.T. McGinnis

12. DATE/TIME STARTED

14. STATEMENT

Q. Did you her the man say anything to the girl he was with?
A. No, I knew he was saying to her but his back was to me then and I just kept on getting up.
Q. What day was it that you bought the ring at the liquor store?
A. Monday.

Q. Do you have any reason why it stands out in your mind as being Monday?
A. Yes, I had got some money from Jackie Monday.

Q. When did you give the ring to Jackie?
A. That same night.

Q. Do you remember what the weather was like the night you bought the ring?
A. I had this same jacket on that I have on right now, and it was raining.

Q. Would you be able to recognize the man that sold you the ring if you saw him again?
A. Im not sure, but I thing that Vivian could if she saw him.

Q. Do you have any problem reading?
A. No.

Q. Is there anything else you would like to add to your statement?
A. No.

END OF STATEMENT//

RM

"The Making of a False Statement is Punishable by Criminal Penalties"

15. I HAVE READ THIS STATEMENT GIVEN BY ME OR HAVE HAD IT READ TO ME. I FULLY UNDERSTAND IT AND CERTIFY THAT IT IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND RECOLLECTION.

Ronald Murphy
SIGNATURE OF PERSON GIVING STATEMENT

16. DATE/TIME ENDED
10-3-84, 8:30PM

17. PAGE 3 OF 3 PAGES

18. OFFICER OBTAINING THE SIGNATURE IN BLOCK 15:

19. PERSON WITNESSING THE SIGNATURE IN BLOCK 15:

55

JX19-00003

A1242

METROPOLITAN POLICE DEPARTMENT, WASHINGTON, D.C.

COMPLAINANT/WITNESS STATEMENT

1. NATURE OF INVESTIGATION: INFORMATION PERTAINING TO HOMICIDE INVESTIGATION	3. UNIT FILE NO.
4. STATEMENT OF: (Last, First, Middle) LONEY, FRANK R	5. DOB: 6/21/46 — 6. SEX: M
7. HOME ADDRESS	8. HOME PHONE
9. EMPLOYMENT (Occupation and Location): MPDC LIEUTENANT FIFTH DISTRICT	10. BUSINESS PHONE: 727-4508
11. LOCATION STATEMENT TAKEN: FIFTH DISTRICT	12. NAME OF OFFICER TAKING STATEMENT (If other than block 19 Include signature)
	13. DATE/TIME STARTED: 10/26/84 1400

14. STATEMENT

WHILE INTERVIEWING A PERSON UNDER ARREST FOR DISORDERLY CONDUCT THAT WAS MAKING ALLEGATIONS ABOUT POLICE MISCONDUCT. THE ARRESTEE BEGAN TALKING ABOUT A HOMICIDE. PREVIOUSLY ADVISED OF HER RIGHTS. THE DEFENDANT WASN'T SURE SHE WANT TO DIVULGE ANY INFORMATION. OUR CONVERSATION (from memory) WAS AS follows:

THE CONVERSATION WAS WITH AMMIE LOUISE BROWN AKA AMMIE L DAVIS DOB 12-23-52 of 1292 MORSE STREET, NW (PD ID # 265-839)

HER: WHAT WOULD HAPPEN IF I GIVE YOU SOMETHING ON A HOMICIDE?

ME: I'd LISTEN. WHAT DO YOU HAVE TO TELL ME? IT APPARENTLY HAS BEEN ON YOUR MIND

HER: I DON'T WANT TO GET INVOLVED

ME: APPARENTLY YOU ARE ALL READY

HER: I WANT TESTIFY IN COURT

ME: MAYBE THAT WON'T BE NECESSARY

PAUSE (@ 2 MINUTES)

HER: THE MOTHER FUCKER JUST GOT OUT OF JAIL THE SAME DAY AND KILLED HER FOR JUST A FEW DOLLARS. HE GOT OUT OF JAIL ON MONDAY AND KILLED HER ON MONDAY.

ME: WHEN DID THIS HAPPEN?

HER: ON OCTOBER 1ST

ME: WHERE AT?

HER: IN THE PARK OFF H STREET

15. I HAVE READ THIS STATEMENT GIVEN BY ME OR HAVE HAD IT READ TO ME. I FULLY UNDERSTAND IT AND CERTIFY THAT IT IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND RECOLLECTION.

Lt Frank R Loney

SIGNATURE OF PERSON GIVING STATEMENT

16. DATE/TIME ENDED: 10/26/84 1500

17. PAGE 1 OF 3 PAGES

18. OFFICER OBTAINING THE SIGNATURE IN BLOCK 15: (Name and Signature)

19. PERSON WITNESSING THE SIGNATURE IN BLOCK 15: (Name and Signature)

EXHIBIT JX020

JX20-00001

WASHINGTON, D.C.
COMPLAINANT/WITNESS STATEMENT

2. NATURE OF INVESTIGATION	3. UNIT FILE NO.
4. STATEMENT OF: (Last, First, Middle) LOVEY, FRANK R	5. DOB / 6. SEX
7. HOME ADDRESS	8. HOME PHONE
9. EMPLOYMENT (Occupation and Location)	10. BUSINESS PHONE
11. LOCATION STATEMENT TAKEN / 12. NAME OF OFFICER TAKING STATEMENT (If other than block 18 include signature)	13. DATE/TIME STARTED

14. STATEMENT

ME: DID HE USE A GUN, KNIFE OR WHAT?

HER: HE BEAT THE FUCK OUT OF HER.

ME: WERE YOU PRESENT WHEN HE KILLED HER?

HER. I WASN'T WITH HIM BUT I SAW HIM GRAB HER BY THE BACK OF THE NECK AND PULL HER INTO THE ALLEY.

ME DID ANYONE ELSE SEE THIS HAPPEN?

HER: YES. I WAS WITH MY GIRLFRIEND SHOOTING STUFF SHE SAW IT TOO. I'M NOT GOING TO TELL YOU HER NAME NOW, BUT, SHE AND I WILL CALL YOU ON MONDAY SO YOU CAN TALK TO HER.

ME: WHAT; THE MANS NAME?

LONG PAUSE

HER. I DON'T WANT TO TALK ABOUT IT

LONG PAUSE

HER: JAMES BLUE

ME WHO?

HER: JAMES BLUE DID IT

ME NOW: NOW YOU SAID HIS NAME AND TOLD ME WHERE. WHEN ANYHOW MAY I TAKE A STATEMENT FROM YOU?

HER. NO. NOT NOW - MAYBE LATER

15. I HAVE READ THIS STATEMENT GIVEN BY ME OR HAVE HAD IT READ TO ME. I FULLY UNDERSTAND IT AND CERTIFY THAT IT IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND RECOLLECTION.

/s/ Frank R Lovey
SIGNATURE OF PERSON GIVING STATEMENT

16. DATE/TIME ENDED 10/26/84 1500

17. PAGE 2 OF 3 PAGES

18. OFFICER OBTAINING THE SIGNATURE IN BLOCK 15: (Name and Signature)

19. PERSON WITNESSING THE SIGNATURE IN BLOCK 15: (Name and Signature)

JX20-00002

57

A1244

METROPOLITAN POLICE DEPARTMENT
WASHINGTON, D.C.
COMPLAINANT/WITNESS STATEMENT

3. NATURE OF INVESTIGATION	3. UNIT FILE NO.
4. STATEMENT OF: (Last, First, Middle) LONELY, FRANK R	5. DOB / 6. SEX
7. HOME ADDRESS	8. HOME PHONE
9. EMPLOYMENT (Occupation and Location)	10. BUSINESS PHONE
11. LOCATION STATEMENT TAKEN	12. NAME OF OFFICER TAKING STATEMENT (If other than block 14 include signature) / 13. DATE/TIME STARTED

14. STATEMENT

ME: MAY I RECORD OUR CONVERSATION?

HER: AH ANT NOW - MAYBE LATER.

ME: DESCRIBE WHAT JAMES BLUE LOOKS LIKE.

HER: I'm NOT SAYING NOTHING MORE

ME: WHY, ARE YOU AFRAID OF HIM?

HER: THAT'S RIGHT, HOT, I DON'T KNOW IF HE KNOWS IT.

ME: HE MUST BE BIG THEN - RIGHT?

HER: THAT NIGGERS ABOUT 6 FOOT 1 AND 300 POUNDS.

ME: THAT'S BIG ENOUGH HOW OLD?

HER: SAY 34

HER: I DON'T WANT TO TALK ABOUT IT ANYMORE AND I WON'T GO TO COURT. CAN I CALL YOU WHEN I GET MY GIRLFRIEND? SHE CAN TELL YOU IT HAPPENED. YOU CAN MEET US SOMEWHERE.

ME: CAN I BRING ALONG ANOTHER POLICEMAN

HER: NO.

ME: HOW ABOUT SOMEONE FROM ANOTHER POLICE STATION LIKE FROM HEADQUARTERS?

HER: THAT WOULD BE OK; BUT, NOT FROM YOUR DISTRICT.

THIS ENDED OUR CONVERSATION

EARLIER IN OUR CONVERSATION, SHE SAID SHE WAS PRESENT WHEN THE ACTUAL HOMICIDE TOOK PLACE. LATER SHE CHANGED HER STATEMENT TO JUST SEEING BLUE GRABBING VICTIM BY THE NAPE OF HIS NECK AND PULLING HER INTO THE ALLEY.

15. I HAVE READ THIS STATEMENT GIVEN BY ME OR HAVE HAD IT READ TO ME. I FULLY UNDERSTAND IT AND CERTIFY THAT IT IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND RECOLLECTION.

Jr Frank R Lonely
SIGNATURE OF PERSON GIVING STATEMENT

16. DATE/TIME ENDED 10/30/84 1500

17. PAGE 3 OF 3 PAGES

18. OFFICER OBTAINING THE SIGNATURE IN BLOCK 15: (Name and Signature)

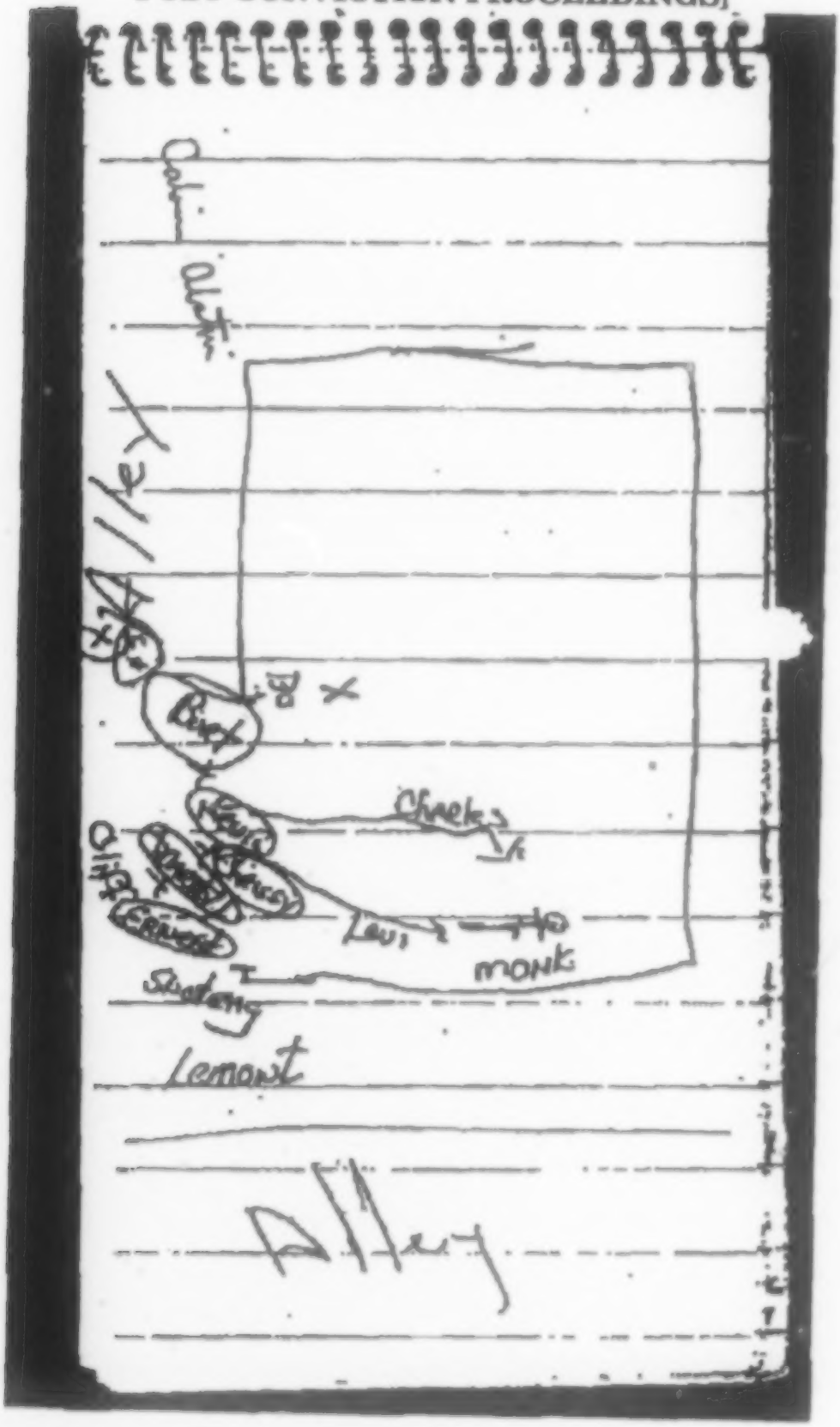
19. PERSON WITNESSING THE SIGNATURE IN BLOCK 15: (Name and Signature)

58

JX20-00003

A1245

[EXCERPT FROM JOINT EXHIBIT 136 FROM POST-CONVICTION PROCEEDINGS]



SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
CRIMINAL DIVISION

Criminal Action Numbers:
F-8617-84

UNITED STATES OF AMERICA

vs.

TIMOTHY CATLETT,

Defendant.

F-6914-84

UNITED STATES OF AMERICA

vs.

ALPHONZO L. HARRIS,

Defendant.

F-8613-84

UNITED STATES OF AMERICA

vs.

RUSSELL L. OVERTON,

Defendant.

F-8614-85

UNITED STATES OF AMERICA

vs.

LEVY ROUSE,

Defendant.

F-5125-85

UNITED STATES OF AMERICA

vs.

FELICIA A. RUFFIN,

Defendant.

F-8616-84

UNITED STATES OF AMERICA

vs.

KEVIN D. SMITH,

Defendant.

F-8513-84

UNITED STATES OF AMERICA

vs.

CHARLES S. TURNER,

Defendant.

Washington, D. C.
Friday, November 1, 1985

Carolyn Sargent-Burns, CP, RPR, CSR
Official Court Reporter Telephone: 879-1036

THE COURT: Yes, sir.

MR. GOREN: I found the notes, Your Honor, and I have turned them over.

THE COURT: Have they had a chance to look at them?

MR. ROBINSON: Yes, Your Honor.

MS. ROBERTS: Your Honor, this is an unrelated matter. There's going to be an objection. We might as well hear it now. I intended to ask this witness about his having attended a lineup on the 18th of October my client stood in. This witnessed identified someone other than my client. Mr. Goren indicated that he would object. It's beyond the scope. If that's beyond the scope –

THE COURT: It is beyond the case, Ms. Roberts.

MR. GOREN: Yes.

MS. ROBERTS: I will call him in my case.

THE COURT: Wait a minute. Just one at time. Ms. Van Susteren.

MS. VAN SUSTEREN: I was going to do the same thing with photographers but wait until –

THE COURT: Would you please.

MS. VAN SUSTEREN: The Government won't release them.

THE: COURT: Now, you're back up.

MS. ROBERTS: I am because Ms. Van Sustern reminded me of a related issue. Mr. Goren has advised me that this witness identified other people since October 18th that resembled the persons in the alley. I don't know if he intends to turn over that information to me or not.

THE COURT: He has completed his examination of him.

MR. GOREN: Yes.

MS. ROBERTS: Well, to the extent that – lot me say this. Mr. Goren did concede that Mr. Freeman's identity was Brady when we asked for his identity. We got it. I'm now suggesting that – to the extent that other persons were identified by Mr. Freeman as being the persons he saw running out of the alley that's also Brady, and I'm asking Mr. Goren, of course, through the Court whether or not he intends to turn over the names and identities of the persons that were identified by this witness as the men he saw leaving the alley and that he clearly doesn't identify my client as being the man. That's something I'll bring in my case.

MR. GOREN: I said this to Ms. Roberts. I don't know if I said it to anyone else but I know I said it to Ms. Roberts because of this lineup issue. I did not consider his identifications to be Brady. In fact, the people he was talking about were people who were in the alley an hour and a half or so after Ms. Fuller was killed. They were coming from Ninth Street. They never went in the garage. They never had any association with the garage. They ran when the police came into the alley, for whatever reason no one will ever know. It didn't seem to me that that was Brady in any way. In fact, nor was the identification procedures that may or may

not have been used with Mr. Freeman to find out who they were or the names of any people that he might have identified photographs.

THE COURT: Do we have to take that up at this moment?

MS. ROBERTS: Not if we're not going to –

THE COURT: Because this jury –

MS. ROBERTS: That's fine. Since the Court has ruled it's beyond the scope, I'll call him in my case.

THE COURT: All right.

MS. ROBERTS: I don't mind tabling the issue until then.

THE COURT; All right, thank you. Anybody else?

MR. ELSTEN: We will join in Ms. Roberts motion.

THE COURT: Where is your motion? I don't know if she has a motion.

MR. ELSTEN: Well, I believe Ms. Roberts has asked the Court to find that these materials were Brady materials. We join.

THE COURT: I don't know that she said that as yet. In any event we'll take that up later.

THE DEPUTY MARSHAL: You want the witness in first, Your Honor?

THE COURT: Yes, would you please, sir.

MR. GOREN: I might just add, the next witness after this is the first officer on the scene, the one who does not have her notebooks. She tells me that she only wrote down the names and addresses of the two people she talked to, one of them is Mr. Freeman. I am not aware of any Jencks material that would have come

out of what she wrote down even if she had a notebook. But the Court indicated that he might want to make some inquiries of her at some point.

THE COURT: If they don't accept your word they can ask them themselves. Unfortunately, it will take a lot longer, but they have that right.

THE DEPUTY MARSHAL: Step around, sir. You want the jury?

[Thereupon, at approximately 2:40 p.m., the the witness returned to the stand and the jury entered the courtroom.]

THE COURT: All right, let the record reflect that the ladies and gentlemen of the jury and alternates are back. All of the defendants, defense counsel and Government counsel are present.

Ladies and gentlemen, occasionally because .. the number of defense counsel who can't assemble around this bench up here, I will have to ask that you go out as you did just now. The fact that I do that – the fact defense counsel and Government counsel are up here has no bearing whatsoever as far as you all are concerned. So, don't let that concern you for one minute. It. has no bearing at all. These are just legal matters that I have to rule on and it has nothing to do with your consideration of the case.

* * *

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
CRIMINAL DIVISION

F-8617-84

UNITED STATES OF AMERICA

vs.

TIMOTHY CATLETT,

Defendant

F-6914-84

UNITED STATES OF AMERICA

vs.

ALPHONZO L. HARRIS,

Defendant

F-8613-84

UNITED STATES OF AMERICA

vs.

RUSSELL L. OVERTON,

Defendant

F-1614-85

UNITED STATES OF AMERICA

vs.

LEVY ROUSE,

Defendant

F-5125-85

UNITED STATES OF AMERICA

vs.

FELICIA A. RUFFIN,

Defendant

F-8616-84

UNITED STATES OF AMERICA

vs.

KEVIN D. SMITH,

Defendant

F-8513-84

UNITED STATES OF AMERICA

vs.

CHARLES S. TURNER,

Defendant

Washington, D.C.
Monday, November 4, 1985

Carolyn Sargent-Burns, CP, RPR
Official Court Reporter Telephone: 879-1036

[TESTIMONY OF MELVIN MONTGOMERY]

* * *

[174] right, and it was raining, so we went on back down to the park.

Q Slow down a little bit.

And when you went back to the park, where did you go in the park?

A To underneath the porch, the little shed.

Q Now, that little shed, the little porch you're referring to, is on H Street or on 8th Street, number eight?

A The number.

Q And what did you do when you got back to the shed?

A We started smoking the reefer.

Q When you got back to the park, do you know what time it was at that time?

A No.

Q Did you, at that time, recognize anybody who was in the park?

A The same people.

Q And when you say the same people, who are you referring to again?

A Bo-Bo, Tim-Tim, Fella, Levy, Silky and Burt.

Q Were they alone or were there other people around at that time?

A There was other people around.

Q Do you have any idea how many people were in the park at that time?

[175] A No.

Q Would you say there were a lot or a few?

A There was a lot of people.

Q Now, where in the park when you got back there were Levy, Bo-Bo, Tim-Tim, Fella, Burt?

A Like up in between the walkway.

Q When you say in between the walkway, what is in between it?

A It's two like – one pile of grass, Platt of grass on another platt of grass.

MR. GOREN: At some point I'll show him a photograph, Your Honor, and that will make it clear.

THE COURT: What was the word he used to describe it? They were where?

THE WITNESS: In between the two platts.

THE COURT: Between the two platts?

THE WITNESS: Yes. Like they are boxed in with grass on top of it.

BY MR. GOREN:

Q Now, do you remember any of the other people who were out there that day?

A No.

Q All right.

What did you and Tommy do while you were – you said you smoked some reefer?

[176] A Yes.

Q How much reefer would you say you smoked at that time?

A Two joints.

Q Had you smoked anything before that in the morning?

A No.

Q And when you say two joints, that's two joints between you or two joints each?

A Two joints between us.

Q While you were sitting there, did you notice what else was going on in the park?

A Yes.

Q What?

A They was making noise.

Q Who is "they"?

A All of them.

Q When you say "all of them," who are you talking about?

A Bo-Bo, Tim-Tim and Levy and Fella.

Q Were they the only ones making noise?

A No, there was other people out there. I just don't remember who they was.

Q What – what kind of noise and what were they doing?

[177] A They was singing Chuck Brown's song, "We Need Some Money."

Q Now, if you could say that slowly.

THE COURT: Singing what?

THE WITNESS: Chuck's song, saying, "We need some money, gotta have some money."

BY MR. GOREN:

Q When you say "Chuck," who are you referring to?

A The singer.

Q Chuck Brown?

A Yes.

Q All right.

And what are the words of that song that you remember them singing?

A "We need some money, gotta have some money."

Q Now, you repeated it twice. Were they singing it more than once?

A Yes.

Q Do you remember who among them was singing that song?

A Tim-Tim.

Q And was he the only one talking – singing that song?

A He was the only one I remember hearing say it.

Q Did you hear other people talking about singing the [178] song?

A Yes.

Q Do you know who those people were?

A No.

Q Do you remember any of the other things that you heard being said at that point?

A No.

Q Just, "We need some money," and the money song?

A Yes.

Q Now, let's talk about Mr. Catlett, the person you referred to as Tim-Tim. What was he doing while he was singing that song?

A Jumping on and off the wall.

Q Which wall is that?

A The little platts where the grass was at.

Q And what about the other people who were with him?

A Some were jumping on and off, too.

Q Do you remember who in particular?

A No.

Q Do you remember whether or not Mr. Overton, Mr. Rouse, or Mr. Turner – Fella, Levy or Bo-Bo were doing any of that?

A Levy and Fella was. Bo-Bo was just standing still.

Q Where was he standing?

[179] A On the ground.

Q Whereabouts in the park?

A Between the two platts.

Q Now, how long did you sit there while all of this was going on?

A We was standing up.

Q Whereabouts? Under the shed?

A Yes.

Q How long were you standing there?

A About fifteen, twenty minutes.

Q Okay.

And you mentioned somebody else as being out there. Silky?

A Yes.

Q What do you recall Silky doing during all this time?

A He was standing up in front of me and Tommy.

Q When you say in front of you, where was he? I don't know where you were standing.

A It is two little stools right underneath the porch in the back.

THE COURT: What?

THE WITNESS: Chairs you sit around and a pole hold them up in the middle. He was in the front stool.

[180] BY MR. GOREN:

Q Was he further into the park or was he out near the sidewalk?

A Out near the sidewalk.

Q All right.

And was he there that whole time?

A Yes.

Q What happened at that point?

A Then he left. He said he had to move his car or something.

Q Who is he?

A Silky.

Q Do you know Silky's real name?

A Roy.

Q You call him Roy?

A Yes.

Q He left and he said he had to move his car?

A Yes.

Q Did you see where his car was parked?

A On the H Street side.

Q On the H Street side?

A Yes, by the bus stop.

Q Okay.

That's the side near the park?

A Yes.

[181] Q And did you see where he moved his car to?

A Over across the street on the other side of the record store.

Q What record store?

A Nat's.

Q So that's the same side of H Street as the People's?

A Yes.

Q Is that the same block that People's is in?

A Yes.

THE COURT: What hundred block would that be?

MR. GOREN: 800 block, Your Honor.

THE COURT: Would it be the north or the south?

MR. GOREN: It would be the north side of the street.

BY MR. GOREN:

Q Now, while he moved his car, what were you doing?

A Still standing there. Me and Tommy was talking.

Q Do you remember what you were talking about?

A He was showing me these jeans he had.

MS. VanSUSTEREN: I didn't hear his response.

THE COURT: I didn't either.

BY MR. GOREN:

Q Say that again.

A He was showing me some jeans he had in a bag.

THE COURT: That was Tommy Mallard?

[182] THE WITNESS: Yes.

BY MR. GOREN:

Q Did Silky, at some point, come back to the park?

A Yes.

Q All right.

And do you know how long he was goine?

A No.

Q And was – did you watch him the whole time?

A No.

Q Do you knew what time it was when he went to move his car?

A No.

Q Did – while you were sitting there, what were Mr. Overton, Mr. Rouse, Mr. Catlett, Mr. Turner – the people you refer to as –

MR. DEBERARDINIS: Your Honor, may we be specific as to which Mr. Turner we are speaking about here?

MR. COREN: He was specific. Mr. Charles Turner.

THE COURT: You referred to Mr. Charles Turner?

MR. GOREN: Mr. Charles Turner.

BY MR. GOREN:

Q Mr. Charles Turner, the person you referred to as Fella, Levy, Bo-Bo and Tim-Tim, what were they doing during the time that you were sitting there – standing there with Mr. Mallard and Silky was crone moving his car?

[183] A They was standing there.

Q Were they still – did you still hear someone singing and talking about making money?

A Yes.

Q Do you remember who that was?

A Tim-Tim.

Q All right.

Now, at some point, did you hear anything else?

A Somebody said they were going to get that one or something.

THE COURT: What?

THE WITNESS: Somebody said they were going to get that one.

BY MR. GOREN:

Q All right.

And did you hear who said that?

A No.

Q What did you do when you heard someone say, "We are going to get that one"?

MR. SULLIVAN: Your Honor, I don't think that's what he said. I think he said "they."

THE COURT: Did you hear one or more people say –

THE WITNESS: I said somebody.

[184] BY MR. GOREN:

Q All right.

Was it one person?

A Yes.

Q What did you do when you heard that?

A I turned and looked.

Q And what did you see when you turned and looked?

A I seen a lady standing at the corner.

Q Now, did you see the people that you were talking about before, Mr. Overton, Mr. Rouse, Mr. Catlett, Charles Turner?

A Yes.

Q Where were they?

A In between the two aisles.

Q In between the two what?

A Platts where the grass is at.

Q And did you see what they were doing at the time that you heard that said?

A Standing still.

Q Did you see anybody doing anything at that point?

A No.

What was it that drew your attention to the lady? Why did you look at the lady?

A Bo-Bo was pointing.

Q What was he pointing at?

[185] A He was just pointing in that direction.

Q And when you followed that direction, that's when you saw the lady?

A Yes.

Q Where was that lady standing?

A On the corner.

Q On which corner?

A On the H Street corner.

Q Do you know whether – could you tell whether or not – what Mr. Overton was pointing to, what Bo-Bo was pointing to?

A No.

Q And you say you turned around. Where were you facing before that, before you turned around?

A The Coco Club (phonetic).

Q Where's the Coco Club?

A In front of the bus stop over across the street.

Q Across what street?

A 8th Street.

Q The number eight?

A Yeah.

Q Now, when you looked over, after hearing somebody say, "Let's get that one," and you saw Mr. Overton pointing, who else was around him at that time?

A Levy, Tim-Tim, Fella.

[186] Q Were there any other people around him at that time?

A Yes.

Q Do you remember who they were?

A No.

Q Were there a lot or a few people around?

A There was a lot of people.

Q Now, at that point, what happened?

A They started to leave.

Q Who is "they"?

A Bo-Bo, Tim-Tim, Levy and Fella.

Q What about the other people who were with them?

A They left, too.

Q Did you see – when you said they left, where did people go?

A Well, like the cars was coming, so –I just glanced at them and seen them going into the street. Then turned back, right, and was talking to Tommy.

Q When you say you glanced and saw them go into the street, do you remember specifically who you saw going into the street?

A Yes.

Q Who?

A Levy and Fella was like together, and Tim-Tim and Bo-Bo was like going. It looked like to me they was going [187] toward 9th Street.

Q Now, what street was it they were crossing?

A H.

Q The letter H?

A Yes.

Q Did they cross – do you remember where they crossed the street?

A Well, Levy crossed closer to the 8th Street corner.

Q The number eight?

A Yeah.

Q And what about Bo-Bo and Tim-Tim?

A They was just like in the middle of the street.

Q Okay.

THE COURT: When you say middle, would that be closer to 7th Street or closer to 9th Street?

THE WITNESS: Closer to 9th.

THE COURT: When you say Levy was closer to 8th Street, Bo-Bo and who?

THE WITNESS: Fella.

MR. GOREN: Well, let me just go over it again.

THE WITNESS: I said Levy and Fella was going toward H Street, and Bo-Bo and Tim-Tim was going – to me it looked like they was going toward 9th Street.

BY MR. GOREN:

Q Did you see where they went?

[188] A No.

Q What did you do at that point that you didn't see where they went?

A I turned back around and was talking to Tommy.

You said there were other people around them at the time that you heard somebody say, "Let's get that one." Did you see what happened to those other people?

A They left, too.

Q Could you tell where they were going?

A No. They was going in the street, too.

Q So you turned back to talk to Tommy, you say?

A Yes.

Q And what happened then?

A Then me and Tommy was just talking, right?

Q Did you look back at all after that, after you saw them cross the street?

A No. When I looked back, they was gone. I didn't see nobody.

Q You say you didn't see anybody?

A Right.

Q Was everybody gone?

A Yes.

Q When you say everybody, there was nobody else in the park at that time?

A Yes, there still was people in the park around the [189] bus stop and things. But wasn't nobody in the back on the side between the two things no more.

Q And that's where you saw –

MS. VanSUSTEREN: I didn't hear that response at all.

THE COURT: Between the two things. Tell them what you mean by the two things.

THE WITNESS: The two platforms where the grass at.

BY MR. GOREN:

Q All right.

What did you and Tommy do at that point?

A We was still standing there talking.

Q And how long did you stand there and talk?

A About fifteen minutes or so.

Q Then what?

A Then I walked him to the corner.

Q Then what happened?

A Then went down towards 7th Street.

Q All right.

A Then I walked back over there and me and Silky were standing there.

Q When you say you walked back over there, where did you walk back over to?

A Back to the shed under the little porch.

Q You said Silky was there?

[190] A Yes.

Q What happened when you got back there?

A Me and him stood there for a little while, then he said, "Let's go sit in the car and warm up."

Q Did you –

THE COURT: He has got to hold his voice up.

BY MR. GOREN:

Q What did you say?

A He said, "Let's go sit in the car and warm up."

THE COURT: Who said that?

THE WITNESS: Silky.

BY MR. GOREN:

Q So what did you do?

A We went to sit in the car.

Q Where was his car when you went to sit in it?

A In front of the record store.

Q All right.

How long did you sit in Silky's car?

A I don't know. It could have been close to half an hour or longer.

Do you remember the things that happened while you were sitting in Silky's car?

A Yes.

Q What happened?

A The radio said something about the Prince tickets [191] was sold out.

THE COURT: I cannot –

THE WITNESS: The radio said something about the Prince tickets was sold out, but there was a card in front of the car saying that the record store had tickets, right? So we went inside the store and asked Nat did he have any more tickets. He said yes.

BY MR. GOREN:

Q You don't have to tell us what everybody said. He went into Nat's Record Store to get Prince tickets?

A Yes.

THE COURT: Silky did?

THE WITNESS: Yes.

BY MR. GOREN:

Q Where did you go?

A I was still sitting in the car.

Q Did Silky, at some point, come back from there?

A Yes.

Q What happened then?

A We sat in the car, and then two ladies was trying to get a jump right?

Q Now, where were these two ladies?

A Talking to the guard in the record store.

Q When you say get a jump, what do you mean?

[192] A For their car.

Q The battery had died?

A Yeah.

Q What did you do?

A The guard had some cables, so he gave the cables to Silky because he said he would give her a jump.

Q Slow down.

A The guard had some cables, so he gave them to Silky Sc. he could give her a lump. So we pulled across the street on the other side to give a jump.

Q Where was the lady's car? The other side, meaning on the park side?

A Yes.

Q And you say you gave them a jump.

A Yes.

Q You helped start the car?

A Yes

Q What did you do after that?

A We pulled back on the other side of the street.

Q And then what?

A Then we sat in the car for a little while. Then we got out of the car and went back to the park.

Q All right.

And when you got back to the park, do you remember recognizing or seeing anybody you knew in the park at that [193] point?

A No.

Q What happened then?

A Then two little guys was fighting.

Q When you say two little guys, are you talking about younger kids?

A Yes.

Q All right.

Then what?

A And then Cliff came. He was with the two little guys that was fighting. He was trying to break them up.

Q When you say Cliff came to try to break them up, who was Cliff?

A That little guy in the corner with the blue shirt – light blue shirt on and necktie.

MR. GOREN: For the record, Your Honor, Mr. Montgomery has identified Defendant Clifton Yarborough.

THE COURT: All right.

BY MR. GOREN:

Q Did you talk to Clifton at that time?

A No. He was trying to break up – telling one of the little guys to go ahead; right?

Q We don't want to hear the whole thing. Did he, at some paint – did he stay in the park?

A No.

[194] Q What did he do?

A Him and one of the little guys left.

Q Did you see what direction they went in?

A They went down H Street towards 9th Street.

Q Had you seen Clifton out there earlier?

A No.

MR. ROBINSON: Objection, Your Honor. Leading.

THE COURT: It isn't leading. The answer to that is yes or no. It doesn't suggest that he had or hadn't. Have a seat, please.

MR. ROBINSON: I have another objection. It has been asked and answered earlier. A number of times he asked who was there.

THE COURT: Have a seat.

Go ahead.

BY MR. GOREN;

Now, you say you got back to the park. What happened when you got back to the park after this incident where you saw Mr. Yarborough?

A Silky told me that he had to leave –

MR. ROBINSON: Objection, Your Honor.

THE COURT: Overruled.

MR. GOREN: Thank you.

BY MR. GOREN:

Q Go ahead.

A Silky told me that he had to leave and would I hold a few bags of reefer for him while he was gone.

THE COURT: Hold two bags of what?

THE WITNESS: A few bags of reefer.

THE COURT: I didn't hear him.

MR. GOREN: Sit up closer and say it again.

THE COURT: Straighten yourself out in the chair so the people out here this way can hear you just as well. Your back is entirely to us.

Go ahead.

THE COURT: He said he had to leave and would I hold two bags of reefer for him.

BY MR. GOREN:

Q All right.

And did you do that?

A Yes.

Q Where did you stay?

A In the same spot I was, in front of the porch, the little shed.

Q And that's on 8th Street, the number eight?

A Yes.

Q How long did you stay there?

A I guess about fifteen minutes or so.

Q Okay.

And what did you do after that?

[196] I left and went down the street to the arcade, then I went in Snyder's.

Q Okay.

How long did you stay there?

A I stayed in there about half an hour.

Q Then what happened?

A I walked back – when I came out Snyder's, I walked back to the corner and Sharon called me. Then she told me they found a little girl in an alley dead.

Q And where was it that you saw Sharon when she told you that?

A On – on the side by the Coco Club.

Q Okay.

Q When you say on the side by the Coco Club, you were on H Street, the letter H?

A Yes.

Q On the corner of 8th and H?

A Yes.

Q But not on the park Side, on the Coco Club side?

A Yes.

Q That would be the southwest corner?

THE COURT: Is that where he was or wasn't?

MR. GOREN: That's where he was when he met Sharon Sinclair.

THE WITNESS: Yes.

[197] BY MR. GOREN:

Q Now, exactly what was it that Sharon said to you at that point?

MR. ROBINSON: Objection, Your Honor. Hearsay.

THE COURT: It is not offered for the truth.

Next question.

BY MR. GOREN:

What did she say to you?

A She said that they found a little girl dead in the alley.

Q Okay.

And what did you and Sharon do at that point?

A Walked back across the street.

Q Which street?

A H Street.

Okay.

A On the side by the park.

Q Okay.

And went where?

A Went straight down to 9th Street.

Q Did you look at the park at that point?

A Yes.

Q And did you see anybody in the park at that point that you recognized?

A Tim-Tim and Bo-Bo.

[198] Q All right.

And could you tell what they were doing at that point?

A Just sitting down.

Q Where were they sitting down?

A Under the little shed.

Q The same one that you had been sitting under?

A Yes.

Q Where did you and Sharon go?

A We went down to 9th Street and up there still by the alley because they had put yellow tape up.

Q Slowly.

You went down 9th Street and then went where?

A Across H Street up in 9th Street.

Q You walked down from in front of the park to 9th Street?

A Yes.

Q You made a left on 9th Street?

A Yes.

Q And you walked up how far?

A To the first house on 9th Street.

Q Where the alley was?

A Yes.

Q What did you see when you got to the alley?

A Yellow tape up.

[199] Q Did you see anything else?

THE COURT: I didn't hear what he said.

MR. GOREN: Yellow tape, he said.

BY MR, GOREN:

Q Where was the yellow tape?

A In the alley, closing the alley off.

Q Did you see any police at that point?

A Yes.

Q Where were they?

A Up in the alley.

Q And were there other people around where you were standing?

A Yes.

Q Do you remember who?

A Sharon's mother, Sharon's sister, and Kenny Wigfall and Warren.

Q Let's do that slowly one at a time.

A Sharon's brother, Sharon's sister, and Mr. Wigfall – I mean Mr. Pendergrast was there.

Q Mr. Pendergrast?

A Yes.

Q All right.

A And. Sharon's stepfather was there.

Q All right.

And you mentioned Kenny Wigfall?

[200] A Yes.

Q Were there other people there that you didn't know?

A Yes.

Q How long did you stay at the mouth of the alley?

A About fifteen minutes.

Q And what did you do after that?

A Silky had came and got his – him and Elwood came around and got the reefer and gave me a bag.

THE COURT: I can't understand.

MR. GOREN: Slowly. Sit close to the microphone.

BY MR. GOREN:

Q Tell me again. Silky did what?

A Silky came back around there and he gave me a ball of reefer and I gave him the other bag.

THE COURT: Where did Silky come to?

THE WITNESS: 9th Street by the alley.

THE COURT: Was he by himself?

THE WITNESS: Him and Elwood was together.

THE COURT: And Silky gave you what?

THE WITNESS: I gave him the bags of reefer back, and then he gave me a bag.

BY MR. GOREN:

Q What had Silky been giving you the reefer for to begin with?

[201] A Huh?

Q What did Silky give you the reefer for to begin with?

A He just told me to watch it; right?

Q Told you to what?

A He just told me if somebody come, right, if they want to search not to – just tell them it was on the ground and take the money.

Q He wanted you, if somebody came, to sell the reefer for him and give him the money?

A Yes.

Q Did you do that at all while you were out there?

A No.

Q Did he – after you gave the reefer back to Silky and kept the bag –

A Yes.

THE COURT: He didn't keep it. He said he was given the bag, according to my understanding of the testimony.

Ladies and gentlemen of the jury, it is your understanding of the testimony that controls at all times during the case, not mine.

MR. GOREN: I clearly misstated that. He did say Silky gave him a bag.

BY MR. GOREN:

Q Why did he give you a bag at that point?

[202] A Because I was holding the reefer for him.

Q Did – what did you do after – after that? Did you leave the mouth of the alley?

A Yes. Me and Sharon left and went to the store.

Q Which store is that?

A She had to play the numbers in People's Drugstore.

We stopped there and she went to Chung King's.

Q Say it again.

A We left and went to Chung King's.

Q Did you say she stopped at People's?

A She had to, but we stopped on the way back.

Q All right.

Now, when you walked down L Street toward Chung King's did you walk on the People's side of H Street?

A Yes.

Q And where did you cross to get to Chung King's?

A We crossed on the other side by the other bank.

Q So you walked down H Street, across 8th Street, and then made a left and crossed there?

A Yes.

Q Did you see anybody down at that corner that you recognized?

A Levy and little Ronny.

When you say little Ronny, who is little Ronny?

A That's his name. He be with Levy. I guess he's [203] Levy's little brother.

Q Do you know his last name?

A No.

Q Can you describe him to us, what he looked like?

A He is short, brown-skinned and slim.

Q When you say brown-skinned, is he darker than you?

A He's about the same.

What about his hair? What does his hair look like?

A Short.

Q Where did you see Mr. Rouse, Levy, and little Ronny?

A On the side by the bank on this side, on the right side.

Q When you say the right side, that doesn't mean anything. The bank across 8th Street, or the bank that's on the same block as the People's?

A The bank across.

THE COURT: Where were Levy and Ronny when you saw them as they were going over to Chung King's?

THE WITNESS: They were on the side by the bank.

THE COURT: Is that north or south side?

MR. GOREN: It's the northwest corner.

BY MR. GOREN:

Now, did you go to Chung King's?

A Yes.

[204] Q And how long did you stay there?

A I guess about ten minutes or so getting food.

Q Okay.

What did you do after that?

A We walked back down the street.

Q Which street did you walk back down?

A H Street.

Q Which side of H Street did you stay on? The side where the park is or the side where the People's is?

A The side where the park is.

Q Where did you walk to, how far down?

A To the corner and crossed over.

Q Which corner?

A 8th and H corner.

Q Did you have an opportunity to look in the park at that point?

A Yes.

A And did you see anybody there that you recognized?

A Tim-Tim, Bo-Bo, and Silky.

Q And where were they?

A Standing underneath the porch, the little shed.

Q Same shed you are talking about you standing under?

A Yes.

Q What did you do from there?

A We went over to People's, into People's.

[205] THE COURT: Was that you and Sharon?

THE WITNESS: Yes.

MR. GOREN: Court's indulgence one moment.

(Pause.)

BY MR. GOREN:

Q Mr. Montgomery, I want you to come down, if you could.

A (Witness complies.)

Q Stand over there so the judge, ladies and gentlemen of the jury can hear. You have to keep your voice up so the court reporter can hear it and the judge and everyone else can.

Do you recognize what you see in this picture?

A Yes.

Q Louder.

A Yes.

Q What do you see?

A The park.

Q When you say the park, what park are you talking about?

A The 8th and H park.

MR. GOREN: Can the Court hear that?

THE COURT: No, I cannot.

THE WITNESS: The 8th and H park.

THE COURT: There is no way, Mr. Goren, and you're [206] standing right there, that any of us are going to hear back here when he is looking at that chart and facing it.

MR. GOREN: I'll do my best.

THE COURT: Please do.

BY MR. GOREN:

Q Tell the Court and the ladies and gentlemen of the jury what park that is.

A 8th and H park.

Q Do you see the shed or the porch that you talked about sitting or standing under?

A Yes.

Q Okay,

Can you point to that?

A Yes (indicating).

Q Now, can you just take this red pen and just circle that porch?

THE COURT: What exhibit is that, please?

MR GOREN: This is Government's Exhibit 7.

THE WITNESS: (Witness complies.)

BY MR. GOREN:

Now, you also testified that when you first got to the park some time after you took your daughter there – home, that Levy, Bo-Bo, Tim-Tim and Fella were in the park.

A Yes.

Q Okay.

[207] Can you just point to the area where they were at that time?

A Right between here –

Q You have to say it loud.

A In between here.

Q Louder, louder, louder.

THE COURT: Let me come down and look.

Can you, ladies and gentlemen of the jury – that's what is most critical as well as counsel – see where he is pointing on that thing? Let me come down and take a look at that.

Where is he pointing, please?

MR. GOREN: Point to that again.

THE WITNESS: It's here (indicating).

THE COURT: Hold your voice up.

THE WITNESS: Like this piece of board here, this one right here, right in here (indicating).

BY MR. GOREN:

Q When you say platt, you are talking about these areas of grass that are planted here?

A Yes.

Q Now, at some point, you said you heard some people singing a song about money and talking about money, and you said a couple of people were jumping on and off walls.

Where was that that they were?

[208] A Right here (indicating).

Q Where?

A In between the platts.

Q That same area?

A Yes.

Q Did you ever see any of the people you talked about or any of the people in that group anywhere else in the park that afternoon?

A One time they went to the back of the park back here. There's a table back there. You can't see to the table.

MR. GOREN: He has pointed to an area on the – I guess eastern side of the, picture of the Park down near the bottom of the pavement area.

BY MR. GOREN:

Okay.

And the last thing is, at some point you said that you saw Levy and little Ronny near a bank. Can you point to where that bank is?

A Right here on the corner (indicating).

MR. GOREN: He's pointing to the northwest corner of 8th and H.

BY MR. GOREN:

Where were they exactly when you saw them?

A About where this black spot is.

[209] MR. GOREN: He has pointed to an area on the sidewalk that is darker. It looks like a little shadow of a helicopter or something right above it.

THE COURT: Is that up 8th Street?

MR. GOREN: It's slightly up 8th Street on the west side of the street.

THE COURT: All right.

MR. GOREN: You can go back up to the witness stand.

THE WITNESS: (Witness complies.)

MR. GOREN: Court's indulgence one moment.

(Pause.)

MR. GOREN: Let me do this without asking Mr. Montgomery to come back down.

BY MR. GOREN:

Q Mr. Montgomery, I want you to look at what has been marked as Government's Exhibit No. 6 and ask if you recognize what you see there.

A Yes.

Q In a loud voice.

A Yes.

Q Okay.

What is that a picture of?

A The whole park.

Q Okay.

Now, you said that at some point – let me see if [210] I can hold it up here so everybody can see it.

At some point, you saw Fella and Levy and Bo-Bo and Tim-Tim, and other people who were in that group cross the street.

A Yes.

Q Can you just point to us where they crossed the street, where you saw them leave the park and where they crossed the streets?

A Yes.

Levy and them came this way. Bo-Bo and Tim-Tim came over this way between the telephone and coming this way (indicating).

Q All right.

A Some other people went that way, too.

THE COURT: I can't hear you.

MR. GOREN: Say that again.

THE WITNESS: A few other people came up across this way, too.

BY M. GOREN:

Q When you say this way, you're talking about the way that Tim-Tim and Bo-Bo went, or the way Levy and Fella went?

A Tim-Tim and Bo-Bo went.

Q Okay.

That was here, not on the corner, but in here in [211] this area?

A Yes.

Q All right.

MR. GOREN: I have no further questions, Your Honor.

THE COURT: Ladies and gentlemen, this is a convenient time to take a break. It is now about three or four minutes after three. Let's be back here in twelve minutes, and we'll sit until 4:30. Okay?

Again, do not talk about the case. Keep an open mind at all times. I'll see you back here in about twelve minutes or so.

You're on the stand. Do not talk with anybody while you're on the stand. If you want to go to the bathroom or anything like that, the marshal will take you to the bathroom. You can have a seat right down there, but don't talk with anybody.

(Whereupon, a brief recess was taken.)

* * * * *

[1] SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
CRIMINAL DIVISION

F-8617-84

UNITED STATES OF AMERICA

vs.

TIMOTHY CATLETT,

Defendant

F-6914-84

UNITED STATES OF AMERICA

vs.

ALPHONZO L. HARRIS,

Defendant

F-8613-84

UNITED STATES OF AMERICA

vs.

RUSSELL L. OVERTON,

Defendant

F-8614-85

UNITED STATES OF AMERICA

vs.

LEVY ROUSE,

Defendant

F-5125-85

UNITED STATES OF AMERICA

vs.

FELICIA A. RUFFIN,

Defendant

F-8616-84

UNITED STATES OF AMERICA

vs.

KELVIN D. SMITH,

Defendant

F-8513-84

UNITED STATES OF AMERICA

vs.

CHARLES S. TURNER,

Defendant

Washington, D.C.
November 13, 1985

Carolyn Sargent-Burns, CP, RPR, CSR
Official Court Reporter Telephone: 879-1036

* * *

[5] DIRECT EXAMINATION BY MR. BEHM:

Q Mr. Thomas, would you state your full name and spell your last name for the record?

A Maurice Antoine Thomas, T-h-o-m-a-s.

Q How old are you, Mr. Thomas?

A Fourteen.

Q Where do you live?

A 1012 Ninth Street, Northeast.

MR. PALMER: Could the witness go a little slower, Your Honor?

THE COURT: Yes.

1029 what, please?

THE WITNESS: 1012 Ninth Street, Northeast.

THE COURT: 1012 Ninth.

Now, would you speak just a little more slowly, please.

BY MR. BEHM:

Q Where do you go to school, Mr. Thomas?

A I attend Hamilton Junior High School.

Q Now, I would like you to look around the courtroom and tell me if you recognize anybody sitting in the courtroom.

A Yes.

MR. ROBINSON: Objection, Your Honor. Be more specific. It is a large courtroom.

[6] THE COURT: I'm sure he will do that, Mr. Robinson.

BY MR. BEHM:

Q Would you step down from the witness stand and point to the individuals you know and tell us their name, if you know it, and what name you know them by, and tell us what they're wearing? Just step down.

THE COURT: Come right over here, please.

[Thereupon, the witness left the stand.]

BY MR. BEHM:

Q Come right down here in front of the table, Mr. Thomas. Start right over there.

THE COURT: Start at this end, on the front row.

THE WITNESS: I know him.

THE COURT: What is his name?

THE WITNESS: I know him as Snotrag.

THE COURT: All right. Now, what is that person wearing, please?

THE WITNESS: He's wearing a blue suit, a blue shirt with a blue tie.

THE COURT: All right.

THE COURT: That, ladies and gentlemen, he's identified Timothy Catlett.

BY MR. BEHM:

Q Who is the next person you know, Mr. Thomas?

A I know him. They call him as Bo.

[7] THE COURT: Which one is he?

THE WITNESS: There.

THE COURT: What is he wearing?

BY MR. BEHM:

Q What's he wearing?

A A blue suit, a white shirt with a striped tie.

Q Okay, tell us the next person – Your Honor, may the record reflect that he has identified the defendant Russell Overton?

THE COURT: It may.

BY MR. BEHM:

Q Who is the next person you know, Mr. Thomas?

A Levy.

Q What is he wearing?

A He wearing a gray – a gray jacket with gray stripes and a white shirt with a black tie.

Q Do you know his last name?

A No.

MR. BEHM: Your Honor, may the record reflect that the witness has identified Levy Rouse?

THE COURT: It may.

BY MR. BEHM:

Q Who is the next person you know, Mr. Thomas?

A I know this man as Hollywood.

THE COURT: Go back and point to the person.

[8] MS. VAN SUSTEREN: We'll stipulate, Your Honor.

THE COURT: What?

MS. VAN SUSTEREN: We'll stipulate he knows Mr. Thomas.

THE COURT: Do you know him as Hollywood?

THE WITNESS: Yes.

THE COURT: Do you know his last name?

THE WITNESS: No.

BY MR. BEHM:

Q Who is the next person you know?

A I know this one as Fella.

Q What's he wearing?

A He's wearing a black suit – a black suit jacket with a –

MR. ELSTEN: Could the witness take his finger out of his mouth, Your Honor?

THE WITNESS: – a white shirt with a gray tie.

MR. ELSTEN: No objection.

THE COURT: All right, that is –

MR. BEHM: May the record reflect the witness has identified Charles Turner?

THE COURT: It may.

BY MR. BEHM:

Q Who is the next person you know, Mr. Thomas?

A Cris.

[9] Q And what's he wearing?

A A brown suit with a white shirt.

Q What kind of tie does he have on?

A He don't have one on.

MR. BEHM: Your Honor, may the record reflect the witness has identified Cris Turner?

THE COURT: It may.

BY MR. BEHM:

Q Who is the next person you know?

A Clifton Yarborough.

Q What's his name?

A Clifton Yarborough.

Q And what's he wearing?

A He's wearing a blue suit with a – a white shirt with a blue tie.

MR. BEHM: Your Honor, may the record reflect that the witness has identified Clifton Yarborough?

THE COURT: It may.

MR. BEHM: You may resume the witness stand.

[Thereupon, the witness returned to the stand.]

BY MR. BEHM:

Q Mr. Thomas, do you remember the day that a lady was killed in an alley between Eighth and Ninth Streets?

A Yes.

Q On that day, as of that day, how long had [10] you known the individual who you identified as Snotrag?

A The next day.

Q No, how long – as – on the day that the lady was killed, as of that date, how long before that had you known the, the person you identified as Snotrag?

A I known – I know him for – I know him for quite awhile before that happened.

Q Where had you seen him?

A Around – around the way, around like where he – right around like Eighth Street or, or K.

Q As of that day, how long had you known the person who you identified as Levy?

A I knew – I didn't – I knew Levy through – I knew him.

Q How did you know him?

A I've known him through Katrina Ward.

THE COURT: You what? Knew who?

THE WITNESS: Katrina Ward.

THE COURT: Is that a female?

THE WITNESS: Yes.

BY MR. BEHM:

Q Where did you see Levy?

A I be – I see him out on the streets. I be seeing him.

Q Had he ever been to your home?

[11] A Yes.

Q Now, how long had you known the person who you identified as Hollywood as of the day the lady was killed?

A I knew Hollywood for – I know him –

Q Where did you know him from?

A From coming up to the center to see – huh?

Q What center?

A The Northeast Neighborhood House.

THE COURT: What is that? The Northeast Neighborhood what?

THE WITNESS: House.

BY MR. BEHM:

Q Had you known him before the lady was killed in the alley?

A Yes.

Q Now, how long had you known the person whom you identified as Fella?

A I knew Fella since I was about in the sixth grade.

Q You've known him since you've been in the sixth grade?

A Yes.

Q And what grade are you in now?

A Eighth.

Q Now, do you know if Fella has a brother?

A Yes.

[12] Q What is his brother's name?

A Crissie.

Q Okay. Is that the person who you earlier identified in court?

A Yes.

Q How long have you known the person whom you identified as Crissie?

A I knew him longer than I knew his brother.

Q You knew him longer than you knew Fella?

A Yes, I did.

Q And how long had you known the person whom you identified as Clifton Yarborough?

A I knew Clifton since I was about in the fourth grade.

Q Now, where did you live, Mr. Thom on October 1, 1984, the day the lady was killed?

A 1012 Ninth Street, Northeast.

Q And where did you go to school on October 1, 1984?

A I attended Eliot Junior High School.

Q Did you go to school that day?

A Yes, but I came home a half a day.

Q What time did you come home?

A About twelve o'clock.

Q Now, what did you do when you got home?

A I was – excuse me. I was – the rain had – I was [13] wet, so I went and put on my night clothes and laid down and looked at TV.

Q Now, did there come a time when you received a telephone call?

A Yes.

Q And who was that call from?

A My Aunt Barbara.

Q About what time did she call you?

A About 3:30 or quarter to four.

Q And what did she say?

MR. ROBINSON: Objection.

THE COURT: Sustained.

MR. BEHM: Well, Your Honor, we are not introducing for the truth of the matter asserted.

THE COURT: As a result of what she said, what happened?

BY MR. BEHM:

Q As a result of what she said to you on the phone, what did you do?

A She asked me –

THE COURT: Not what she asked you. Did you do something as a result of what she asked you?

BY MR. BEHM:

Q What did you do after you talked to her on the phone?

[14] A I put on my clothes.

Q And where did you go?

A To her house.

THE COURT: What was the name of the girl, please?

THE WITNESS: Barbara.

THE COURT: Barbara.

BY MR. BEHM:

Q Why were you going to her house?

A To have dinner with her.

Q Where did she live on that day?

A She lived on Eleventh Street.

Q Do you know what on Eleventh Street, between what other streets?

A Eleventh and – Eleventh and H.

Q Did she live right on the corner of Eleventh and H?

A No, she – she lived like – okay, there's a store on the corner of Eleventh and H. Okay, the side of the store is on Eleventh Street. Okay, you pass – there is a big house. Her house is right on the alley. The alley – if you go through the alley, you will go straight through Tenth Street.

Q Is the next street up I Street?

A No.

Q Okay. What did you do when you got to your Aunt Barbara's house?

[15] A I took off my coat and put down my umbrella and washed my hands and sat at the table and we ate.

Q Who finished dinner first?

A She had.

Q Now, what did she do when she finished dinner?

A She washed our plates, put on her coat, got her umbrella, and went around to my house.

Q What did you do?

A She told me after I finished eating to go wash my plate and get her umbrella from her room, by her door, and come out and close the door tight because the top lock would go on.

Q What did you do after you finished eating?

A I washed up my plate, went to her room and got the umbrella.

Q What did you do?

A I walked out, locked the door, and went to Eleventh Street. I hit the – I went to Eleventh and Eighth.

THE COURT: You're going a little too quickly. Would you slow it down?

BY MR. BEHM:

Q You made a left?

A Yes.

Q On H Street, right?

A Yes.

[16] Q Where did you go then?

A I went – I walked down to Eighth Street and stopped at the –

THE COURT: What street did you go down, Eleventh Street?

THE WITNESS: Yes.

BY MR. BEHM:

Q What did you do when you got to Eighth Street?

A Stopped at the light. I crossed by Tenth Street, crossed on the street of Tenth Street, the light.

Q And you were walking down H Street at this point; is that right?

A Yes.

Q Okay, after you crossed Tenth Street, where did you go?

A I was on – I was – I had to cross – I would like still be on Eighth Street. I was on the same side of Murray's Steak House.

Q Okay. And where is Murray's Steak House located?

A On Ninth and H.

Q On the corner of Ninth and H Street?

A Yes.

Q What did you do when you reached the corner of Ninth and H Street?

A I had made a right, and I walked up and I had [17] glanced up the alley and then I had walked –

Q What alley is that?

A The alley on Ninth and I.

Q Okay.

A And then I went over to the – across the alley, and then I had to stop and went up a little bit more because I was looking up the alley.

Q Okay, when you looked up that alley, what did you see?

A I just saw people with someone in the middle.

Q Okay. Now, did you know who that person was in the middle at that time?

A Yes.

Q No, the person in the middle, did you know who that person was?

A Oh, no, I didn't.

Q So, when you saw this group of people around another person, what did you do next?

A Excuse me?

Q What did you do next after you saw this group of people in the alley around another person?

A I just stood there.

Q What happened next?

A And then I just saw someone patting her down.

Q Would you stand up and show us how this someone was [18] doing it to the person?

A Like this, patting her pockets and – her pockets on her.

Q Okay, you may resume your seat.

May the record reflect the witness patted himself on the chest and on his pants pocket?

THE COURT: It may.

BY MR. BEHM:

Q Now, did you recognize the person who was patting her down?

A Yes.

Q Who was that person?

A It was Snotrag.

Q After he patted her down, what, if anything, did you see him do?

A He had put something in his pocket. I don't know if it was from her or did he drop anything. I saw him put something in his pocket.

Q And then what happened?

A Then he hit – when she fell, everyone else started hitting. I heard her say can someone please help me. That's when I went up the street.

Q You say you saw Snotrag hit this person?

A Yes.

Q When he hit her, what happened to her?

[19] A Everyone else started hitting.

Q When everyone else started hitting, did you know anyone else –

A She fell down.

Q No, did you recognize any of the other people that were in that group?

A Yes.

Q Could you please tell us who those other people were?

A It was Snotrag, Clifton, Levy, Fella –

THE COURT: Wait a minute, Snotrag, Clifton, Levy. Who else?

THE WITNESS: Fella.

THE COURT: Fella?

THE WITNESS: Uh-huh. Hollywood, Crissie and Derrick.

BY MR. BEHM:

Q Do you see Derrick in the courtroom today?

THE COURT: Look around and see if you see him.

THE WITNESS: No.

BY MR. BEHM:

Q Now, did everybody in that group start hitting the lady?

A Yes.

Q Did the lady – did you hear the lady say anything?

[20] A She said could someone please help me.

Q What did you do next?

A I just – I ran up the street. And the first person I saw was my Aunt Barbara, so I told her.

Q Where was she?

A She was on my front porch.

Q Okay. Did you say anything to her?

A Yes.

Q What did she say to you?

A I – what did she say to me?

Q Yes, sir.

A She didn't say nothing. She told me to come in and tell her what I had to tell her.

Q Did you tell her what you had seen?

A Yes.

Q What did she tell you?

MR. ROBINSON: Objection.

MR. ELSTEN: Objection.

THE COURT: Did she make some statement to you, sir? Did she tell you something, yes or no?

THE WITNESS: Did she tell me anything?

THE COURT: Uh-huh.

THE WITNESS: No, she didn't tell me nothing.

THE COURT: Did she say something to you as a result of your having told her what happened?

[21] THE WITNESS: When I told her, she said don't say nothing to –

MR. ROBINSON: Objection.

THE COURT: Overruled.

BY MR. BEHM:

Q What did she tell you?

A When I told her what I saw and – she just told me don't say nothing to no one else.

Q Now –

THE COURT: Now, who is that, your aunt?

THE WITNESS: Yes.

THE COURT: How far did she live from that alley on Ninth Street?

THE WITNESS: From the alley you could – she live right on Eleventh Street. You make a left and go back down and keep – you go past Tenth Street, but the next corner where the church – a red church, you can cross that street.

THE COURT: How did you get to her house from that?

THE WITNESS: How did I get to her house from my house?

THE COURT: From where you were looking in the alley, how did you get to your aunt's house?

THE WITNESS: I left out her gate and I locked the gate. She live on Eleventh and H. I came out her gate as soon as I locked the gate.

[22] MR. BEHM: Your Honor, if I could interrupt.

BY MR. BEHM:

Q Where was your aunt when you told her what you had seen in the alley?

A On my front porch.

Q Your front porch?

A Right.

Q What was that address?

A 1012 Ninth Street, Northeast.

THE COURT: You went to your house, not your aunt's house?

THE WITNESS: Yes.

BY MR. BEHM:

Q Had you seen other people in the alley that day when you looked up and saw other people in the alley?

A Yes.

Q Were you able to recognize them?

A No.

Q Why not?

A Because I didn't get a good look at them.

Q Where were they standing in relation to the group that you just described?

A They was standing back from them.

Q Now, how certain are you that that was Snotrag that you saw in the alley?

[23] A Because –

Q How certain are you?

A I'm – I'm sure it was him.

Q And how did you recognize him?

A By the way he's built and the shirt he wear with white stripes up it.

Q What kind of shirt was it?

A It was a – it was a tank – like a shirt tank like, tank top like.

Q And what color was it?

A It was blue with white stripes.

Q Did you see his head that day?

A No, I saw the back of it.

Q You saw the back of his head?

A Yes, I did.

Q And did that help you to recognize him?

A Yes.

Q Now, how certain are you that you saw Clifton Yarborough in that group in the alley around that lady that day?

A Yes, I'm sure.

Q And how did you recognize Clifton Yarborough?

A By his face.

Q Did you see the front of his face that day?

A Yes.

[24] Q How certain are you that you saw Levy in the alley that day, Levy Rouse?

A I'm sure I saw him in the alley.

Q How did you recognize him?

A By his face.

Q How certain are you that you saw Fella, Charles –

MR. ELSTEN: Objection, Your Honor. The ID has not been placed in doubt yet. He's rehabilitating him before it's been placed in doubt. He should be asked did he see him. He should be asked did he see him or how did he recognize him.

THE COURT: Overruled.

BY MR. BEHM:

Q How certain are you, Mr. Thomas, that you saw the person you identified as Fella, Charles Turner, in the alley that day?

A Yes, I saw him.

Q How certain are you you saw him?

A I'm positive.

Q How did you recognize him?

A By his tallness, his build, and the shirt he have. Like Snotrag had the little vest like with the blue stripe.

Q What color was his shirt?

A The same color blue with white lines.

Q Was it exactly the same as the shirt you described [25] Snotrag as wearing?

A Yes.

Q Did you see the – his head that day?

A No,

Q What did you see?

A How I recognized him?

THE COURT: Uh-huh.

BY MR. BEHM:

Q Yes.

A I recognized him by the height and the way he was built up here and the back of his head.

Q You did see the back of his head?

A Yes, I did.

Q Now, how certain are you that you saw Crissie in the alley, in that group, that day?

A I'm not that sure about Crissie.

Q What led you to believe that it was Crissie in the alley?

A It was someone that was shaped liked Crissie and built like Crissie at the top, but I'm not sure that it was Crissie.

Q Did you – how tall was this person? Was he tall, medium, short, what?

A He was like shortlike, his height.

Q Okay. How certain are you that you saw Hollywood [26] in the alley, in the group, that day?

A I'm not that sure about Hollywood.

Q What was it that led you to believe that it was Hollywood you saw in the alley that day?

A Because I saw someone who was built like him up top and his size and his height.

Q And did you see the back of his head?

A Excuse me?

Q Did you see the back of this person's head who you thought was Hollywood?

A Yes.

Q Now, how certain are you that you saw Derrick in the alley, in that group around the lady, that day?

A I'm not that sure about Derrick.

Q How do you – what wore the things that led you to believe it was Derrick whom you saw?

A Because I saw someone who was tall like Derrick, that was skinny like Derrick.

Q And where had you known Derrick from?

A From Katrina Ward.

Q Now, after you went to your house and spoke to your Aunt Barbara, what did you do next?

A After that, I went to the store for her.

Q What store did you go to and why did you go there?

A She would like to have – she wanted a soda that day.

[27] Q Okay. And which store did you go to?

A To Framer's, the store right next door to my house.

Q And what did you find when you got there?

A He didn't – he didn't have a Pepsi or Coke, so I had to go to the store down Ninth and I.

Q Okay. And did you see anybody when you got down to that store on Ninth and I?

A Yes.

Q Who did you see?

A I saw Snotrag.

Q Did you see anybody else there?

A Excuse me?

Q Did you see anybody else there at that store?

A Yes, a person he was talking to.

Q And what was that person's name, if you know?

A Know him by?

Q Yes.

A I know him by Charles.

Q Do you know his last name?

A No.

Q That's not Charles Turner, the person you identified as Fella, is it?

A No.

Q Okay. Now, did you – did you hear Snotrag say anything to the person you knew as Charles?

[28] A Yes.

Q What did he say?

A He said we had to kill her because she spotted someone he was with.

Q Now, Mr. Thomas, I'd like you to come down here. Step down. I'm going to show you what's been moved into evidence and identified – marked for identification as Government Exhibit 9.

[Thereupon, the witness left the stand.]

Stand right over here so all the people behind you can see.

Now, do you recognize what this photograph depicts?

A Ninth Street.

Q Now, do you see Ninth Street on that photograph?

A Yes, right here.

Q You're going to have to keep your voice up. Where is it?

A Right here.

Q Okay. Would you point to where you were standing when you looked up the alley?

A About –

THE COURT: What exhibit number is that, please?

MR. BEHM: This is Government's Exhibit No. 9, Your Honor.

THE WITNESS: Right here.

[29] BY MR. BEHM:

Q Do you want to take this pen and mark your initials right where you were standing?

MS. ROBERTS: Your Honor, may I move up?

THE COURT: Surely.

MS. ROBERTS: Thank you.

THE COURT: As long as you don't get in the jurors' way.

MS. ROBERTS: I'm going to try not to, Your Honor.

THE COURT: Anybody else want to go up there and look, you certainly may do so.

BY MR. BEHM:

Q Make your initials just a little bit bigger than that, Maurice, Mr. Thomas.

A [The witness complied.]

Q Put a circle around your initials.

A [The witness complied.]

Q Okay. Now, I'm going to show you what's been marked as Government's Exhibit 11 and moved into evidence. Do you recognize what this photograph depicts, Mr. Thomas?

A Yes.

Q What is that?

A This is Ninth Street and this is Shontel's (phonetic).

Q Okay. Do you see –

[30] THE COURT: What number? Five, you say?

MR. BEHM: This is Government's Exhibit 11, Your Honor.

THE COURT: Eleven.

BY MR. BEHM:

Q Do you see the alley in this picture that we're talking about?

A Yes.

Q Where is that?

A Right here.

Q Is that the entrance to the alley that you were looking down?

A Yes.

MR. BEHM: Okay, thank you. You may resume the stand.

[Thereupon, the witness returned to the stand.]

I have no further questions of this witness, Your Honor.

THE COURT: Just a minute. What time is it?

MR. GOREN: It's 2:30.

THE COURT: Ladies and gentlemen, you all have just been sitting a half-hour, but we've been in here an hour, so I'm tired and I want to take a break. This is a convenient time to take it. Let's take a break, please, until a quarter of three.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA CRIMINAL DIVISION

F-8617-84

UNITED STATES OF AMERICA

vs.

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F-8513-84

UNITED STATES OF AMERICA

vs.

CHARLES S. TURNER,

Defendant

Washington, D.C.
Wednesday, December 4, 1985

Carolyn Sargent-Burns, CP, RPR, CSR
Official Court Reporter Telephone: 879-1036

* * *

[44] CLOSING ARGUMENT ON BEHALF OF THE GOVERNMENT

MR. GOREN:

May it please the Court. Ladies and gentlemen. A dollar bill is a friend of mine, a nickel, a dime, it's loveboat time. I need some money. I've got to have some money.

It all began with a song in a park in northeast Washington, and it ended in a brutal senseless murder. You have sat here, ladies and gentlemen, for six weeks now. You have heard a great deal of testimony. You have [45] evidence of a brutal murder committed in the course of a kidnapping, evidence of a brutal murder committed in the course of an armed robbery.

You have heard how a number of people, including all of the defendants here on trial, gathered in that park in northeast Washington on the corner of 8th and H Street. You have heard how they were singing, joking, playing, watching, waiting; how there was a conversation that they participated in; that they discussed and planned a robbery.

You have heard how they selected their victim. You have heard how they followed her as she walked down

H Street sometime around 4:30, quarter to five that afternoon; how some of them went to the H Street side to follow her up to the alley and some went to 9th Street.

You have heard how they shoved her into that alley and began to beat her. You have heard how they dragged her down the alley, carried her down the alley, all in a group after the fierce beating, where she slipped or fell and was dropped on the ground and beaten, kicked some more.

You have heard how they dragged her by her legs into the garage, that dimly lit garage, trash strewn all about; how they took her chains, how they took her rings, how they took her purse, how they stripped her of her clothes, how they fought over the proceeds.

[46] You have heard how Levy Rouse, with all of them around watching, some yelling encouragement, took some kind of pole and shoved it into her rectum with such force that it penetrated the rectum wall, eleven inches into her body.

You have heard how they beat her and tortured her and fled and left her there to die. Ladies and gentlemen, you have heard about a number of people participated in, assisting each other, helping commit a kidnapping, taking Ms. Fuller into the alley with the purpose of robbing her; taking her further into the alley into that garage.

You have heard evidence of how all of these people helped, assisted, aided each other in committing an armed robbery. And, you have heard how in the course of that kidnapping, in that robbery, Ms. Fuller was beaten to death.

Moreover, ladies and gentlemen, and following Judge Scott's instructions, you've heard what each of the defendants did independent of the others, what each of their actions were, what each of them did to assist in the kidnapping, assist in the robbery, assist in the beating that led to her death.

You have heard how each one of them aided in making sure that the kidnapping succeeded, that the armed robbery succeeded, and that she died.

You have heard how they each participated, knowing [47] that a robbery was going on, knowing that they were kidnapping her in furtherance of those crimes.

You have heard how each one of the people here on trial, what each one did, how each one aided in committing the crime of kidnapping, armed robbery and felony murder.

Very soon after I have had a chance to address you and each of the defendant's lawyers has had a chance to address you, Judge Scott will instruct you in the law, and you will go back into the jury room for the last time to deliberate, to think about the testimony, to look at the exhibits, and to make a final decision about the guilt of these ten people.

Before you do that, make a decision about what happened, the facts, because that's clearly your job at this point, to decide what the facts are, decide what to believe. You will be asked to take those facts, understand the law as Judge Scott will instruct you, and make a final decision.

What I suspect he'll tell you is a number of things about the law so you will understand what the principles of the law are. One of the most important

principles in this case must be very obvious to you now. There is ten people here. There were more than ten people involved in the activity that took place in that park, in that alley, in [48] that garage on October 1st.

You heard testimony from several of them. You have heard about some of the others. It is important, knowing that, to understand that not – in order to find any one of these defendants guilty, you don't have to find that each one of them did every act that constitutes the commission of a kidnapping or armed robbery, or that each one of them delivered a death blow.

What you do have to consider, what you do have to understand is a concept that's referred to as aiding and abetting. And what I expect Judge Scott to tell you is that an individual who participates in a crime in some way does not – in order to be found guilty, does not have to personally commit every one of the acts involved in committing that crime; that anyone who knowingly associates themselves in some way with the actions of others with the intent to commit a crime is guilty as if they had done all of the acts.

That is, if someone participates in some way to help commit the kidnapping or the robbery, they are as guilty as is the principal, the person who does the main act. What you have to find is that each of them engaged in some conduct, some conduct, to further the offenses of kidnapping or robbery. Now, you may hear some argument from some of the [49] lawyers, "Well, my client was maybe just there, physically present, didn't do anything." And you are going to hear from Judge Scott that even mere physical presence, just being there – if you find that the mere physical presence, the being there was intended to aid, to help

other people in committing the crime, is enough to make someone an aider and abetter.

What I would submit to you is that the evidence shows that none of the people here were merely present; that each of the people here, each of the defendants did something that day to make sure that the kidnapping succeeded, did something that day to make sure that the robbery succeeded, and did something that day to make sure that the murder occurred.

You will be told that aiders and abetters don't have to have the specific intent to commit that crime; that the crime could have been committed in some way other than they originally thought it was going to happen, not necessarily the way that it was planned. That there need be no direct communication between people, that they didn't need to talk about ever ing that was going to happen. That if they just saw what was happening, indicating by their actions that they knew what was happening, indicated by their actions that they wanted it to happen, participated in some way, no one ever had to talk about it at all.

[50] If someone came upon what happened in that alley and joined in in the beating, joined in and picked up some of the property, they are guilty of all the crimes as if they had planned it, talked about it, discussed it from the very beginning.

Thinking about that in terms of the kidnapping itself, anyone who beats Ms. Fuller, anyone who followed her in an attempt to trick her, and dragged her into the alley, anyone who helped carry her down the alley, anyone who was around her wanting to help hide her while they carried her into the alley, anyone who was yelling encouragement, anyone who went to

the other side of the alley in an effort perhaps to cut off her avenue of escape, anyone who was a lookout, aiders and abetters, guilty of kidnapping.

Thinking about the armed robbery, anybody who thought of the idea and followed across the street supporting the other people, anyone who helped pull her into the alley, anyone who beat her when she was initially taken into the alley, anyone who carried her or -- in a supportive way, went down the alley with the people who were carrying her, guilty of armed robbery.

Anyone who beat her when she got down to the garage, anyone who took her property, her coat, her umbrella, her money, her jewelry, her change, her ring, anyone who stood in that doorway intending to make sure [51] that no one else could see what was happening in that garage while the robbery went down, guilty of armed robbery.

And you can think for yourselves the reasons for that kind of a law. Anybody who helps someone else commit a crime has to take the responsibility as if they had done the entire crime themselves.

One kick, yelling encouragement, taking a ring, aiders and abetters and guilty. They don't need to intend the particular act. No one had to intend that the pipe be inserted into Ms. Fuller's rectum; that her clothes be taken off of her. No one had to intend the specific acts themselves.

An aider and abetter is liable for any criminal act which in the ordinary course of things would have naturally and probably happened. If two or more people go into a store knowing that someone is going to take something from the counter and steal it, and instead that person goes in and slaps somebody around and robs them, assaults them, the person who

thought that only a minor crime was going to be committed there is guilty of all the crimes that are committed by the other person, because they are the natural and probable consequences of those acts. Aiders and abetters are guilty as if they had done everything, as if they had planned everything, as if they had intended everything to happen.

[52] Now, you also will be instructed on what it is to commit a kidnapping, what it is to have to find from the facts that each of these defendants, independent of each other, did either directly or as aiders and abetters in kidnapping Catherine Fuller on October 1st.

Now, you will be told that there are several elements of the offense, several things that you have to find in order to find these defendants or each defendant, any defendant, guilty of kidnapping.

First, that the defendants directly or either as aiders and abetters, seized, carried away, confined Catherine Fuller against her will. That she was held, detained, for some purpose of benefit to these defendants, or of some purpose of benefit to any of these defendants, speaking about aiders and abetters.

The kind of purposes that might be of benefit to these defendants in that situation is to help them commit a robbery, to facilitate the robbery. Isn't that why they dragged Catherine Fuller into that alley, to make the commission of the robbery easier, where nobody could see them, where it was less likely that they would be caught, where it was easier to hide her body?

Isn't one of the purposes for taking her back into that alley for kidnapping her, for confining her in that garage, to make it less likely that she would be found [53] soon so that they could get away.

There is no set time that people have to be detained. There is no set distance that people have to be dragged. It's the acts of seizing, confining, carrying away for a purpose of benefit to these ten people or to any one of them.

Here the crime of kidnapping is a separate and distinct offence, as long as you find that it wasn't incidental to the robbery. What does that mean? Where the kidnapping places the victim, Catherine Fuller in this case, in greater danger, where it makes it more likely that she would be robbed and that the robbery would succeed, where it's less likely that the defendants would be caught, then the kidnapping is separate from the robbery. They could have robbed her on the street. They could have beat her on the street. But, they didn't. They dragged her into that alley, not just into the mouth of the alley, all the way down the alley. Not just all the way down the alley, but into that old vacant garage, where the robbery took place, where all of – of her effects, her clothes, her purpose, her keys, her boots, the robbery took place in that garage where she was kidnapped to.

And you will be told by Judge Scott, I expect, that in order to find these defendants guilty of armed robbery, you have to find that they either directly or as [54] aiders and abetters took property from Catherine Fuller, property of some value against her will. That they took possession of the property by force and violence; that they took it from her immediate actual possession; that it was off of her person, from her body; that they carried the property away; that they did so without any right to do it, and they did it while armed with a dangerous weapon.

Now, the dangerous weapon in this case, generally a dangerous weapon, you'll hear, is anything, anything

that is likely to produce great bodily harm or death. And, in deciding that, you look at the way something was used to decide whether it was used as a dangerous weapon. Here that pipe was used in a way that did cause great bodily harm and helped lead to – and as you heard from Dr. Bray, in and of itself would have led to, in all likelihood, Catherine Fuller's death.

And you will also hear, and you should understand if you listen to the elements of the offense, the things that have to be found, that the robbery wasn't over until everybody left, until they carried the proceeds away; that the weapon was used in the course of the robbery, making it an armed robbery.

And finally you will be instructed on what felony murder is. There are two counts of felony murder. One count is tied to the kidnapping charge and one count is tied [55] to the armed robbery charge. You should understand that there weren't two murders, but there are two theories as to how the murder – why the murder occurred.

Felony murder, generally, you will be instructed, is where the defendants or defendant inflicts injuries upon the decedent, upon the person who died, and it is from those injuries that that person dies.

And second, that those injuries were inflicted by the defendant while perpetrating a crime, a felony. Now, there are two counts. One and two theories. That they injured Ms. Fuller, that they beat her and they inserted that pipe into her in the course of kidnapping her. And the second theory is that they beat Ms. Fuller and inserted that pipe in the course of robbing her.

I would submit to you that they did both. That it was in the course of the kidnapping they kicked and

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I would submit to you that they did both. That it was in the course of the kidnapping they kicked and

beat her as they dragged her down the alley; that the kidnapping was still ongoing when they inserted the pipe. She was still being confined in that garage. And that it was in the course of the robbery that they beat her and inserted the pipe while her property was being taken away and taken off of her. That they are guilty of both counts of felony murder.

You will also be told that this is not a crime in which the Government has to prove or you have to find that any [56] of the defendants had a specific intent to kill Ms. Fuller. No one needs to show that they wanted to kill her at the time. Any killing, even without the intent to kill, committed in the furtherance of a kidnapping, any killing, even if committed without the intent to kill, in furtherance of an armed robbery, is felony murder.

Even if – and this is not the case here I would submit to you – even if the killing is accidental. Anybody who commits a robbery and someone dies during the course of that, guilty, felony murder. Anyone who commits a kidnapping and someone dies in the course of that, guilty of felony murder kidnapping.

And you are going to hear some special instruction about the fact that there is more than one person here on trial in terms of the felony murder. Again, under the theory that aiders and abetters are guilty as are the principals, as are the people that do most of the act.

If a number of people aid and abet, help each other commit a felony, commit a kidnapping, commit a robbery, and only one of them kills somebody, they are all guilty of felony murder. Both the person who actually did the killing and the person who aided and abetted in the commission of the robbery, even if they

didn't want to kill anybody, didn't think about killing anybody, only thought about robbing someone, they are guilty, all of them.

[57] And this is true as long as the killing was committed in the – or the injuries were caused in the furtherance of the commission of a felony, in furtherance of the commission of the kidnapping or the robbery; or, again, if the killing was the natural and probable consequence of the actions that these people took in committing the robbery or in committing the kidnapping.

Now, you are going to hear a number of other instructions about other principles of law, but that is what I will expect you will hear Judge Scott tell you about the crimes of kidnapping and armed robbery felony murder and the concept of aiding and abetting.

Before you get to that, before you can begin to think about – about the guilt of these defendants as applies to those crimes – and again, as the judge instructed I emphasize, too, each defendant deserves to be judged on his own actions, the evidence against him. You shouldn't let your opinion about what any one defendant did, influence your opinion about what anyone else did.

But before you can get to that, you have to relive what happened on October 1, 1984. You have to go back there. You have to put yourself there for the five or ten-minute period when Catherine Fuller was beaten to death and robbed.

You have to understand what happened that day [58] before you can make a judgement about the guilt of these ten people. And, in doing so, you have to understand that that was a different world than the world of this courtroom. That was a world that when

we first gave opening statements, the Government and the defense lawyers mentioned to you, told you about a world that maybe you didn't understand at all, that you maybe didn't have any knowledge of. It was beyond your own experience.

You may think some of the witnesses are people who are very much unlike you. You may think that the witnesses are people who don't think like you at all. A world of nicknames, Chopper, Go-Go Randy, Southeast Wayne, Pebbles, Girl-Girl, Smurfette, Boo, Snotrag, Monk, Bo-Bo, Luncheon Lisa, Hollywood, Fella, Crissie – names that when you walked in here meant nothing to you, but now do.

It's a world where young people smoke PCP and marijuana often and think nothing of it; a world of go-gos, a world where instead of wearing watches people tell time by what's on television. A world where loyalties to one's comrades are so much greater than to one's community or to some of the things that some of us might think are moral or right. A world where the police are the enemy.

You have to go back to that park having a difference understanding of what that neighborhood was like, and you have to put yourself there. You have to understand [59] how that park was a hub for that northeast neighborhood, where it was the meeting place, the place to meet girls; where it was the place to catch the bus, the transportation center of the neighborhood; where people were out there morning, noon and night.

You have to put yourself back in a world where the first of the month meant a – was a very important day where people got their checks, where people got paid, where the stores did a lot of business because of that.

You are going to have to go back in the jury room and openly discuss, as you have not been allowed to discuss up until now, the testimony you heard, discuss what you all believe happened that day.

And, in order to understand all of that, you have to go back there. You have to be there. You have to put yourself in the shoes and in the bodies and in the minds of people who are very unlike you.

You have to see what happened from their point of view, from the point of view of some people who are very young. You have to put yourself back there and put yourself in a role that you are unfamiliar with but that you have heard about. You have to think of an event that perhaps you could never have comprehended before you sat on this jury. You have to put yourself back there in the role of the participants of that murder, of the witnesses, of some [60] of the girlfriends of some of these young men.

You have to – in order to think about that testimony and understand it, you have to see what happened that day as a very fast-moving, a very confusing, a very emotional, a very shocking event.

You have to feel the fear, you have to feel the excitement, you have to feel the shock in order to understand what it is that people saw, what it is they did, why it is that they never said anything about it.

You have think of the role played by Melvin Montgomery who was in the park. You have to think about the role played by Harry Bennett, Derrick, by Calvin Alston, by Carrie Eleby and Linda Jacobs, Smurfette, and by Maurice Thomas.

You have to go there and be in their minds. You have to understand why they were where they were at,

how they might – given their backgrounds, given what they saw, given what they are, given their ages, given their intelligence, why they would act the way you might have seen them act on the witness stand.

You have to understand and put yourselves back there so that you can see that this fact-moving, emotional, brutal event is the kind where no two people would ever see everything that happened. That no two people who saw it could ever come away and describe it to you in the exact [61] same way.

And understanding all of that, you have to go back to October 1st, sift through the evidence, and decide what happened. So, let me, if I can, review for your or with your some of that evidence, go back to October 1st and think.

The weekend was over. For many it had been a weekend of football games, family, church. For others, some of the young people, it had been a weekend of go-gos, partying, spending time in the park with their friends, going to places like Cherry's, the Coliseum, the Panorama Room, some of the go-gos; dancing to some of the local bands, Essence, Troubles.

It was October 1, 1984. It was a new day, the beginning of a new week of the new month. It was cold. It was raining. Otherwise it was a normal day for the northeast Washington neighborhood.

It was a day that began like any other. People going to work. People going to school. Places like Springarn, McKinley, Ludlow Trailor, Elliott, Hamilton. Going down to 8th and H to catch the bus as they had often, or walking to school. People going to work, some of them driving, some of them going to 8th and H to catch the bus.

It was a day for the storekeepers to look forward to. William Freeman set up the vendor stand early in the [61] morning hoping that business would be good because it was the first of the month. You have heard about People's, Matt's records, Family Liquor, Chung King and Father & Son, the carry-outs down the street, Murray's Steak, all of them looking forward to the first of the month, the day when people had money, a day when business was very good.

People were getting paid in their jobs. People were getting Government checks. It began normally for most people, a day that would blend into the beginning the day before and blend into the day after. But for – and for those people there would be no memories of this day. It was uneventful.

But for some it would be a most memorable day, a day that they would never forget, and I'm sure now a day that you will never forget. At noon the community was awake. People were about their business.

Melvin Montgomery got up sometime late that morning and a little before twelve went to walk down to his daughter's school, past the park at 8th and H, to pick her up. And on the way down there, Melvin Montgomery, who have lived in that neighborhood for a number of years, saw Levy Rouse, the gentleman sitting there in the gray coat; saw Russell Overton, sitting there in the sweater with the purple tie, Bo-Bo he's called; saw Timothy Catlett sitting there in the white sweater and the blue jacket, Snotrag, [63] saw Charles Turner, Fella, sitting second from the right, a coat and tie.

He knew them well and he saw them in the park sometime around noon. They were the first to arrive.

Melvin Montgomery walked to school and walked back and still he saw them there.

And, from the evidence that you have heard from Melvin Montgomery, others, other people began to arrive in that park. Before the afternoon was over, Alphonzo Harris was there, Lisa Ruffin was there, Kelvin Smith – Hollywood was there.

MS. VAN SUSTEREN: Objection. Mr. Montgomery didn't say that.

THE COURT: Ladies and gentlemen, it is your recollection of the evidence that controls. It is not counsel's, either counsel's recollection.

MR. GOREN: As the afternoon wore on, people gathered in that park, and at some point Kelvin Smith, Hollywood, was there; Christopher Turner, Crissie, were there; Steve Webb was there, and Clifton Yarborough was there in that park.

They were joking, singing. Steve Webb was banging on a trash can at some point. Timothy Catlett, Snotrag, was singing a song. Melvin Montgomery didn't say that others joined in. Dancing around on the walls, joking, talking to [64] girls, watching people get on and off the bus, waiting, watching.

That afternoon Catherine Fuller, whose ankle was injured, decided not to go to work. Her husband, David Fuller, Jr., was up in his bedroom as he often is watching television. He gave her $50 to go to the store. Catherine Fuller's son, David Fuller, III, the young David Fuller, saw her on the phone, saw her with her boots on, saw her with her hair up in rollers, a scarf on, saw her getting ready to leave. It was about 4:30.

Catherine Fuller with $50 tucked in this change purse stuffed in her bra, wearing a number of rings on

her fingers, two gold chains about her neck, carrying this umbrella, wearing this raincoat, left her house. She headed down toward H Street.

And at that time, all of the defendants who sit here on trial were in the park. Snotrag, Monk, Bo-Bo, Levy, Luncheon Lisa, Hollywood, Fella, Crissie, Steve Webb, and Clifton Yarborough, and others.

Lisa Ruffin was not with the main part of the group. She was off a ways with some other people, some men, some women. You heard that there were other people there, Darryl Mercherson, Lamont Bobbit, James Michael Campbell, someone they call Burt, playing, joking, singing the money song.

[65] It was crowded. At about 3:30, Harry Bennett, who had been at some other part of the park, walked up to that area where they were. Having been at this bus stop, he walked into this area here where the telephones are, near the trashcan underneath this tree, where these little plots of grass are, where they have been singing and dancing and talking and joking all afternoon. Harry Bennett walked up and saw all of them in this area.

After a little after 4 o'clock, Calvin Alston arrived, and he, too, saw all of them in this area, saw, as Melvin Montgomery had told you, Timothy Catlett, singing; Steve Webb banging on the trashcan.

At about this time, Melvin Montgomery was still sitting in the park. Carrie Eleby and Linda Jacobs, interested in seeing Hollywood, Kelvin Smith, were making their way down toward the park somewhere up on 8th Street, a bus, walking

Maurice Thomas was probably finishing lunch at his Aunt Barbara's house up on 11th Street, a few blocks

away. He was probably getting his umbrella, his Aunt Barbara's umbrella, closing and locking the door and leaving the house and heading down the way.

And while they were making their way to the park, Calvin Alston, as he admitted, began to talk to Levy Rouse, Bo-Bo, Russell Overton; Darryl Mercherson, his friend; Snotrag, [66] Catlett; Monk, Mr. Harris, and some others, talked about getting paid, talked about robbing someone. They discussed, with all of them around listening, with Lisa Ruffin not far away – they discussed how they were going to rob someone that afternoon. They discussed robbing someone off the bus.

Calvin Alston's idea, he said. Levy Rouse thought that was a bad idea. And they discussed how they were going to get paid, how they were going to rob somebody, who they were going to rob.

Carrie Eleby and Linda Jacobs moving toward the park, Maurice Thomas walking down 11th Street toward H Street. Catherine Fuller coming from her house up to K Street between 9th and 10th, walking down 9th perhaps, you never know, walking down past Murray's Steak, LaDomingo's on the corner of 9th and H, rounding the corner, minutes from her death.

And as she walked in front of the People's, Calvin Alston said, "There goes one there. Let's rob her." And he pointed, Darryl Mercherson pointed, others pointed. Melvin Montgomery said Russell Overton, Bo-Bo, is one of the ones that pointed. They saw her.

What were they dong pointing? They were all showing each other who it was they were going to rob. And as she walked in front of People's down toward the corner of 8th and H, they decided to rob her. They

all said they're game. They all said, "Sure, let's rob her."

[67] It wasn't a vote. It wasn't a board meeting. It was a group of people who discussed a robbery, who had discussed who the victim should be, who decided that this four foot eleven, ninety-nine pound woman, was going to be their victim. They saw her. The spotted her. They agreed upon it, and then they did it.

Levy Rouse, Charles Turner, Fella, Calvin Alston, crossed first; others right behind them. Calvin didn't look behind him, he said. Alphonzo Harris, Monk, and others went to the 9th Street side. Why? To make sure she couldn't get away, to make sure nobody would catch them, to make sure there was no avenue of escape.

Clifton Yarborough crossing with Calvin Alston, "Hey, Calvin, I want you to do me a favor. Be a lookout for the police. I will give you some money later," which he did.

And Harry Bennett, who heard all of it, saw all of it and went with them. Following behind Calvin Alston and others, following behind Levy Rouse, Charles Turner, Fella; Charles Turner saying – Calvin Alston heard it – "Let's ask her the time. Let's trick her." Didn't say, "Let's trick her." "Let's ask her the time."

As they got up behind her, they walked behind her. They walked right next to her, according to Bo-Bo, Mr. Bennett and Mr. Alston. She turned her head as if somebody had [68] asked her something and that's when Charles Turner, Fella, shoved her into the alley, and Calvin Alston pausing momentarily against a car, but rushing in behind, as he admitted he did.

Linda Jacobs, Melvin Montgomery was in the park, heard them say, "Let's get that one there," saw the pointing. Minutes later he left. Carrie Eleby, Linda Jacobs, arriving somewhere in that park area minutes after they left. Maurice Thomas now may be walking down H Street between 9th and 10th getting close to Murray's Steak.

And in the alley Ms. Fuller began to struggle. She attempted to hit Charles Turner, according to Calvin. And he struck her back, the first one to hit her. Levy Rouse joined in and hit her in the head with a two by four, a big two by four in the head. You will notice – remember the patterned mark on Ms. Fuller's face as if done with something hard?

Calvin Alston joined in as did others at that point. You heard testimony, didn't you, that Mr. Catlett joined in at that point; that Mr. Harris joined in at that point coming down from the 9th Street end. That Hollywood, Mr. Smith, joined in; that Crissie, Christopher Turner, joined in; that Steve Webb joined in at that point. Hitting, kicked Ms. Fuller as she fell on the ground.

The kidnapping was complete at that point; wasn't [69] it, having taken her off street, removing her from public view, taking her down the alley somewhere in this area? But that wasn't enough. She was carried by Mr. Rouse and Mr. Turner, Fella, down the alley, down to what they call the cut, somewhere in this area right here, where she slipped or was dropped and where the beating continued.

And as she was carried down there, she was hollering, help, police, somebody help me, from the beginning hollering. Not wanting anybody to hear, not wanting anybody to see; not wanting anybody to be

caught, having committed themselves to this robbery, they carried her further into the alley where the beating continued.

Maybe she was making too much noise. Maybe they were afraid that someone would hear and look out of the window and see them. And at about this time, Maurice Thomas, rounding the corner of Murray's Steak, making a right turn, headed toward home.

Carry Eleby, Linda Jacobs, having arrived in the park looking for Hollywood, the father of her baby, come to the mouth of the alley, approaching the mouth of the alley. And, as the beating continues there, Maurice Thomas walks up behind Murray's Steaks, and looks in the alley from here and sees the beating going on. He sees Levy, he sees Cliff, he sees Crissie, he sees kelvin.

MS. VAN SUSTEREN: Objection. He said he wasn't [70] sure.

THE COURT: Excuse me.

MR. GOREN: He sees someone he thinks is Crissie who he has known for a long time; someone he thinks is Kelvin who he has known a long time. He sees Fella. He sees Snotrag. And he sees someone who he is very unsure of who he thinks is Derrick. All of them hitting her.

He stays there momentarily and leaves. Carrie Eleby and Linda Jacobs coming into the alley, sees what they think is a fight, and they're curious. To them it's a carnival, because that's the kind of people they are, maybe. It was a fight and they wanted to see it just like there's fights at the Coliseum that they want to see.

Not knowing what was happing, others in the alley at that point, Lisa Ruffin, who was in the park, who must have now something was going to be going down, who might have heard that conversation, who went into the alley, and while Ms. Fuller was being beaten and dragged down the alley, followed, chains ripped off of Ms. Fuller's neck, thrown to the ground.

And, who was seen picking them up? Lisa Ruffin looking down on the ground with Vincent Bugbay and Christopher Taylor, Mike Campbell, other people there. There wasn't any testimony about whether Burt hit anybody, but he was there. Lamont Bobbit, Darryl Mercherson.

[71] And didn't you hear testimony that each and every one of the ten people here were there at that point; that Snotrag participated in the beating, kicking and hitting Catherine Fuller; that Alphonzo Harris participated at the cut of the alley in hitting and kicking Catherine Fuller; that Bo-Bo, Russell Overton, participated in kicking and beating Ms. Fuller at the cut of the alley; that Levy Rouse continued to kick and hit Catherine Fuller at the cut of the alley, while Lisa Ruffin was picking things up and leaning down in the area where things had been thrown.

She didn't leave. She didn't help. She didn't say anything as far as the evidence shows. And if she had been a participant of that beating and looked over at Lisa Ruffin at the moment that that was going on when she was picking up things or bending down over the area where things were strewn about, would you have thought that she was helping you, supporting you, interested in accomplishing what you were interested in accomplishing? Isn't the answer to that yes?

And as they dragged, as Russell Overton dragged by the feet, causing tremendous scrape marks on Ms. Fuller's back, all shown in Government's Exhibit 45-C, dragged her from the cut four or five years into that garage over all of that broken glass, cutting her back – and the whole group moved with him into the garage, into the confines of [72] that garage where the robbery continued.

Maurice Thomas was on his way home. Carrie Eleby and Linda Jacobs had come down into the alley and stood by this fence here where they had originally seen Kelvin Smith, Hollywood, and Crissie, Christopher Turner. Dragged her into the garage and began to remove her clothes, all of which were found in that alley – I'm sorry, in the garage, her boots strewn about on the floor, her coin purse, her pants, her underwear, her panty hose, all removed in the garage as w[illegible] her rings, as was the money from this purse.

And while that was being done and was done quickly, people crowding around her body, people crowding around the front door of that garage, some yelling, "Let me see, let me see," Ms. Fuller still alive at that point. Levy Rouse goes and gets some pipe. And while Bo-Bo and Fella held her legs with Steve Webb and Calvin Alston right there – remember Harry Bennett said it looked like they were holding her legs – Larry Rouse knelt down between her legs and took that pipe and shoved it into her rectum, eleven inches; while Alphonzo Harris yelled, "Shove it in more."

The carnival was over for some people, Linda Jacobs, Carrie Eleby, who when they saw that and saw that it wasn't a fight at the Coliseum, both left. They may have been using PCP that day, but don't you think that [73] sobered them up real fast?

They saw that and they left. Standing in the back of the group, everybody else started to leave. Harry Bennett left. All of the other participants started to leave. But somebody stayed behind so that they could drag Catherine Fuller's body further out of view and hide it in that corner, a corner of the garage that couldn't be seen from outside.

They dragged her there. After all of them had witnessed what had gone on, some of them had participated directly in what had gone on, evidence, isn't there, that each and every one of these ten people was inside that garage, including Calvin Alston, Harry Bennett?

Snotrag was there fighting over the purse with Clifton Yarborough. Alphonzo Harris was there, standing near her body. Bo-Bo was there holding on to her legs. Levy Rouse was there with a pipe. Lisa Ruffin was there getting a ring from Levy before the pipe was inserted.

Kelvin Smith, who had been at the fence with Christopher Turner, moved into the garage in front of the girls. Fella was there holding another leg. Steven Webb was there standing near her leg. Clifton Yarborough arguing about money with Snotrag. They were all there, witnessed it all, participated in it all.

And they all left, leaving Catherine Fuller to die [74] in that dirty, vacant garage. Some of them went to the park. Some of them went home.

THE COURT: Excuse me. Is this a reasonable time to take a break? The jury has been sitting a little over an hour.

MR. GOREN: Can I have ten more minutes? That would be better for me.

Some of them left to go to the park. Some of them left to go to the arcade. Some of them left to go home. Some of them left to go to their girlfriend's houses. And while they were doing that, Catherine Fuller died in that garage.

At about 5:30, Dr. Bray estimated, she was dead, 45 minutes after this happened. She could have been dead as early at 5 o'clock. She could have been dead as early at 4:30, he said. He can't be sure.

But we know she died before six when her body was discovered by William Freeman who went back to that garage to go to the bathroom. At 6:07 the police received a call from a young woman who was with Mr. Freeman. At 6:18 the police arrived on the scene, the first officer was Stephanie Ball. About 6:30 Detective McGinnis and Detective Sanchez from homicide arrived. At 7:30 Dr. Bray arrived and pronounced Catherine Fuller dead.

He did an autopsy. You heard about it. You saw [75] him illustrate what he found on several diagrams. And then he found out that she was beaten in a way that clearly shows she was hit a number of times all about the body, thirteen different injuries I think he said below the head, that she had bruises and injuries all about the head, both of her eyes, major areas of injury here, along the side of the facts on both sides; and the he confirmed that just what all of the witnesses who told you about what Levy Rouse did while she was on her back in that garage, that there was some pipe-like object inserted eleven inches into her rectum.

Totally consistent with everything that you heard testimony about.

If the Court wants to take a break, Your Honor, this would be fine.

THE COURT: I think it's a reasonable time. Ladies and gentlemen, please do not discuss the argument thus far amongst yourselves. Keep an open mind. See you back here in about fifteen minutes.

(Whereupon, a brief recess was taken.)

THE COURT: Are you ready, Mr. Goren?

MR. GOREN: Yes, Your Honor.

THE COURT: Call the jury, please.

(Whereupon, the jurors entered the courtroom.)

THE COURT: All right. Let the record reflect [76] all defendants, defense counsel, ladies and gentlemen of the jury and the alternates are present. Government counsel is present.

MR GOREN: Ladies and gentlemen, you are going to be instructed at some point that some of the evidence against – that has been presented at this trial is evidence that you are only to consider against one defendant, individual defendant. Things like the statements that Kaye Porter testified she overheard Snotrag, Mr. Catlett make; evidence only to be considered in determining Mr. Catlett's guilt.

Statements that Detective Villars overheard that Mr. Christopher Turner and Mr. Overton, Bo-Bo and Crissie, say; evidence only to be considered in considering their guilt.

Maurice Thomas' overhearing Timothy Catlett, Snotrag, telling someone by the name of Charles – we didn't know anything further, didn't know where he lives or where he was – they had to kill the lady, she recognized someone.

The statements that Trina Ward testified to you she heard from Levy Rouse, admitting that he was there and telling her, after she had called him a nasty dog, that he had one worst things, he did the worst thing to that lady in the alley. The evidence on his pants, those [77] things, evidence to be used only in considering Mr. Rouse's guilt.

And you saw Clifton Yarborough's videotaped statement in which he admitted his presence that day in that alley and described to you some of the things he did; evidence to be considered only in considering the guilt of Clifton Yarborough.

There is a great deal of other evidence that you should consider as a whole in deciding what happened that day. You have to take a hard look at it, examine it in terms of how it fits together, how it supports itself and each other, how it's corroborated.

And, in doing so, you have been instructed already once and you will be instructed again, that there are a number of defendants and there are a number of counts; ten people, four individual counts, four individual charges applied to each one of them, and that you must consider the evidence independently as to the guilt of each one of the defendants on each one of the counts, considering only that defendant's conduct and the evidence which applies to it.

And you will have to go back and sift through the evidence, the testimony that you just heard, and remember what was the evidence against each one of these people, what was it that they were said to have done. Timothy Catlett, five witnesses testified about Timothy Catlett's activities [78] that day.

Melvin Montgomery, seeing him in the park and singing that song, the same song that Calvin Alston

said he sang. Harry Bennett, Derrick, Calvin Alston, Carrie Eleby and Maurice Thomas all identifying Snotrag, Timothy Catlett, as being in the alley and participating in the beating, and both Mr. Alston and Mr. Bennett saying that it was Timothy Catlett who had this change purse.

Five people who told you what Timothy Catlett did that day, as well as the statements that Maurice Thomas said he overheard Mr. Catlett making minutes after this kidnapping, robbery and murder had occurred, a half a block from there, in which he said, "We had to kill the lady. She recognized someone." And the admission he made to Kaye Porter in which he said, "I just kicked the lady."

Now, Mr. Harris, Monk, said he was with James Henry that day. And you will have to consider he admitted first of all that he was in that neighborbood, that he was in and passed through that park thirty minutes, wasn't it, before Ms. Fuller was attacked and killed. And you will have to consider weren't all of the witnesses who confirmed his alibi contradicted by each other, by some of their past statements; that they were all, weren't they, uncertain about the most important part of his alibi, and that this that at the time, and what it all boils down to is Mr. Harris [79] saying, "I was with James Henry at the important time," James Henry who was one of his best friends who he saw a lot, who said different things at different times about the same matters, who contradicted what some of the other witnesses for Mr. Harris said, and who demonstrated his truthfulness by his comments and his testimony about his girlfriend, Ida Lock; that testimony contracted by every other witness about when he was there, how many times he was there, what he was there for and what he did.

Harry Bennett, Calvin Alston, both saw Alphonzo Harris at that park that day. Both testified that he was present when the robbery was discussed. Both testified that at that place, having some in the 9th Street side, at that place in the alley, the cut, it was – that's where Alphonzo Harris, down at this part of the alley, hit and kicked Ms. Fuller.

Both testified that he was in the garage, and testified that it was Alphonzo Harris who said, "Shove it in more," at that time this pipe was being inserted in Ms. Fuller's rectum.

Mr. Overton says he was home – his alibi witnesses say he was home drunk in bed. And you heard some testimony from Edna Adams, his grandmother, who, didn't she say, wasn't sure about the day, wasn't sure about the sun, wasn't sure about very many of the details and had to be made to [80] remember. Lottie had to make me remember that day."

One of the important things that Lottie had to make Ms. Adams remember is why he was there, because Ms. Adams testified, didn't she, that she didn't even remember Lottie being there? But now she did, and now she remembered it was October 1st, and now she remembered it was rainy and not sunny. And she remembered all that because Lottie made her remember. Lottie, Mary Phyllis Overton, Mr. Overton's sister, who admitted that she had to tell her grandmother everything because she had to make her remember.

Carrie Eleby, Harry Bennett, Calvin Alston, Melvin Montgomery, all saw Russell Overton that day. They saw him in the park. They saw him participating and heard him participating in that conversation. They saw him leave the park and go into the alley. They

saw him participate, several of them, kicking Ms. Fuller at the cut.

And, all of them said that it was Russell Overton who dragged the lady into the garage and who stood there and held her legs while Levy Rouse inserted the pipe into her rectum.

Mr. Rouse was with Christopher Taylor; 16 years old. Why don't you go back in the jury room and just try to count how many times Christopher Taylor changed his story about what he did that day with Mr. Rouse, contradicted by a whole host of prior statements at which he admitted on [81] at least three occasions, two police officers, that he was there in the park, Christopher Taylor, that he saw what happened that he witnessed Ms. Fuller being robbed and killed.

Mr. Rouse mimicked, didn't he, Mr. Taylor's testimony about what they did that day. And didn't he demonstrate to you that he would change the story from one minute to the next, saying one thing and two minutes later saying something entirely different?

Six people – excluding Trina Ward, six people saw Levy Rouse in that day in the park. Five of them saw him in the alley. Mr. Bennett, Mr. Alston, Carrie Eleby, Linda Jacobs and Maurice Thomas. The four who saw who put the pipe in Ms. Fuller all say it was Levy Rouse. They all saw him participate in the beating of Ms. Fuller.

And then there is the evidence of Trina Ward hearing statements from Mr. Rouse about what he did that day; that he was there, that he did the worst thing to that lady in the alley. Levy Rouse, who, that night, was seen by Trina Ward with blood on his pants, on the inside of his pants. And while he was leaning

down with that pipe, must have gotten blood all over him. Not from a bloody nose, no blood anywhere else.

Felicia Ruffin, who was known by Harry Bennett, well. Didn't he testify that she was good friends with [82] his friend who lived right next door right down the street, Nicole, who he knew very well, who he saw in the park back away from the group a little bit, who he saw in the garage, saw her picking up things, saw her receive that ring?

I think the question, though, that you have to ask yourself about Mr. Bennett is, knowing her – well, he couldn't be mistaken – why would he say that she was there if she wasn't? What reason in the evidence is there for him to lie about Ms. Ruffin?

Kelvin Smith, Hollywood, and Christopher Turner, Crissie, were both in the same place that day over at Kelvin Smith's house. All of the people who testified about that were family members of – or good friends of the two of them, all close relations.

They were home all day in spite of the fact that you heard from several witnesses that they saw Kelvin Smith and Christopher Turner at the alley when the police were there. George Raspberry saw him. Vincent Gardner saw at least one of them.

Think about the witnesses that testified they were there that day and think about the confusion amongst who was present, what time, various things happened. Think about Mr. Smith's testimony, Mr. Turner's testimony.

Most importantly, think about how on the day of the murder they got phone calls telling them about the murder, [83] one of them from Rene Walker that came before the police ever discovered the body. Didn't they

testify that when mom came home from work, when Denise Riddick arrived, before Grandma went downstairs, the phone call had come in and they were told? That was 6 o'clock, 6:30. Before the police discovered the body, Rene Walker called and told them that she heard about a little girl being killed.

And the two phone calls that Mr. Smith and Mr. Turner received, one from Vincent Gardner, who denied he ever called them, the other from Rene Walker, who said at the time she called them, having denied she called them in the Grand Jury – the time she called them she was involved with Jerome Diggs, her boyfriend, Beanie. When did that happen?

Now she wasn't sure, but back then she said November 16th. Sometime in November she made this phone call.

Kelvin Smith was seen by Harry Bennett, Calvin Alston, the young woman, Carrie Eleby, who had his baby; Linda Jacobs, and Maurice Thomas who, in deference to Ms. VanSusteren, said he saw a number of people –

MS. VAN SUSTEREN: Object to that, Your Honor.

MR. GOREN: – who he recognized and he thought it was Kelvin. He thought it was Crissie. People that he knew very well.

MS. VAN SUSTEREN: Your Honor, I ask that the [84] record be stricken.

THE COURT: What?

MS. VAN SUSTEREN: The deference to Ms. VanSusteren.

THE COURT: He was paying respect to your objection that you made a moment ago.

MS. VAN SUSTEREN: He should be arguing the evidence, not making comments.

MR. GOREN: Harry Bennett, Calvin Alston, saw Mr. Smith in the alley in the park, saw him participate in the beating, kicking and hitting Ms. Fuller. One of them saw him at the first part of the alley, Mr. Alston, actually participating. The other said, "He was there, but I didn't see him do anything."

Mr. Bennett, Mr. Alston, Ms. Eleby, Mr. Thomas, all saw Mr. Smith participating in the beating at the cut. Several of them saw him inside the garage. Others didn't and didn't see who everybody was in the garage. Mr. Bennett saw him. Ms. Eleby saw him. Ms. Jacobs saw him.

And Mr. Turner, also by the same people, Mr. Bennett, Mr. Alston, Eleby –

MR. ELSTEN: Can we have which Mr. Turner you're talking about?

THE COURT: Will you, please?

MR. GOREN: Christopher Turner.

And by Mr. Thomas, five people who saw each of [85] them in that alley, in the park, who described to you what each of them did.

Mr. Turner who, when he was arrested, was very interested in how the police knew we were in the alley. He talked, had a discussion with Mr. Overton, with Detective Villars listening. "The police don't go nothing. We didn't touch the body."

Mr. Charles Turner. Well, you have a choice with Mr. Charles Turner; don't you? He was either home with his mother and his brother, Carlos, and his sister,

Charlene, as Ms. Alston, his mother, and Carlos testified.

Or you can choose to believe Mr. Turner himself –

MR. ELSTEN: Objection, You Honor. Carlos did not testify he was in the home.

THE COURT: Ladies and gentlemen, it is your recollection of the evidence which controls. It is not Mr. Goren's recollection nor Mr. Elsten's recollection.

MR. GOREN: You can choose to believe that Mr. Turner was at Charlene's house, as you heard testimony, or you can choose to believe Mr. Turner himself, who said he wasn't at his sister's house but he was home all alone that day.

What did he do? "I don't recall." The only thing he does recall is Vincent Gardner coming over to get him [86] and Levy Rouse coming over to get him. Both contradicted that. And in that regard there was some testimony from different witnesses for one defendant that relate to the defenses of another defendant.

You shouldn't pay attention to the conflicts at all, one might be right, the other might be right. Look at the evidence against them directly. Look at the witnesses who say where they were. That's the basis for deciding the guilt of each of these people.

Charles Turner, who was seen in the park all day long by Melvin Montgomery. Seen crossing with Levy Rouse, just the way that Calvin Alston described. Mr. Bennett, Mr. Alston, Mr. Thomas – Maurice Thomas, all saw Fella, all saw Charles Turner in that alley, beating Ms. Fuller, kicking Ms. Fuller, hitting Ms. Fuller.

And Alston says that he was one of the people, Mr. Charles Turner, who held Ms. Fuller's legs while Levy Rouse inserted the pole.

Mr. Webb, who was seen by Mr. Alston, Mr. Bennett, and Ms. Eleby, who didn't know his name at the time, called him the red boy, who did in fact identify him at the time she testified in the Grand Jury by photograph, seen in the park, seen in the alley at the cut, struggling with, hitting and kicking Catherine Fuller by all three of them.

And finally Clifton Yarborough. Mr. Robinson, you [87] may recall in his opening statement, stated to you that Mr. Yarborough was going to present evidence that he was at his girlfriend, Tandra Hill's house, doing homework at the time of the murder.

You heard from Tandra hill, and you didn't hear any testimony about Clifton Yarborough being at Tandra Hill's house on October 1, 1984. All you heard from the witnesses who testified about Clifton Yarborough is that Maurice Thomas didn't like him.

Mr. Robinson promised you that evidence and didn't deliver it. I promised you that you would hear testimony about what Clifton Yarborough did that day. And didn't you hear that he was in the park from Mr. Montgomery, Mr. Bennett, Mr. Alston? That Mr. Bennett and Mr. Alston and Carry Eleby, as well as Maurice Thomas, saw Clifton Yarborough in the alley?

MR. ROBINSON: Objection, Your Honor. There is no evidence that Mr. Bennett ever identified Mr. Yarborough.

MR. GOREN: I'm sorry, that is absolutely correct. Mr. Bennett saw Mr. Yarborough in the park. Mr. Alston, Ms. Eleby, and Mr. Thomas saw him in the

alley. That Mr. Alston and Mr. Thomas saw him participating in the beating. That he was in the garage struggling with Mr. Catlett over this change purse.

And finally, as evidence against Clifton Yarborough [88] alone, his own statement that you saw on videotape, in which he admitted he was there, and interestingly enough talked about, didn't he, about money and how he held money?

Five witnesses, including himself, or in addition to himself.

Now, ladies and gentlemen, you are going to hear from each of the lawyers that represent each of these defendants. And what I expect – one of the things I expect you will hear is, "Don't believe Harry Bennett. Don't believe Calvin. Alston. The made deals. They can't be believed. They can't be trusted. They admitted they lied when they gave their statements. They admitted they are murderers. Don't believe them."

Well, the decision as to whether to believe them or not, it's not mine and it's not theirs. It's yours. You will hear from Judge Scott that an accomplice – that's what they are, accomplices, they participated in that beating, they told you that – is a competent witness, is a witness that can be called to testify like any other witness.

And you have a right to consider the reasons they're testifying as you do with any witness. And you have a right to consider, and you should consider what they are trying to do when they made these plea bargains, these agreements with the United States.

[89] But be assured that if you believe an accomplice, you may convict a defendant for a crime based on that accomplice's testimony alone. There doesn't need to be any corroboration if you believe it.

And one of the things that you should – that I stress to you and that you should think of as being very important as a factor is deciding the extent to which to believe Derrick, Harry Bennett, or Calvin Alston, is the fact that this is not uncorroborated testimony of an accomplice, but corroborated by many, many pieces of evidence, many other witnesses.

Not only do they corroborate each other, not in every detail but substantially. But they're corroborated by the physical evidence, what was found on the scene. They are corroborated by the medical examiner who testified about the kind of beating this was, what must have been entailed in it, the kind of force and the number of blows that were necessary to shatter four ribs puncturing the lung, to shatter Ms. Fuller's liver, the kind of injury that the doctor said he usually sees in car crashes or people who fall from buildings, the number of bruises about her head, all corroborate what happened that day and what they say.

And they are corroborated by Carrie Eleby, Linda Jacobs, Maurice Thomas, people who are totally [90] unrelated to each other.

And at least in terms of some individual defendant's when you consider each defendant individually, the statements that Maurice Thomas and Kay Porter heard, corroborate their testimony as to Mr. Catlett. What Detective Villars heard corroborates some of the testimony as to Mr. Overton and Mr. Christopher Turner.

What Ms. Ward told you about the things that Levy Rouse said, about the blood on his pants, about his admissions about doing the worst thing to that lady corroborate their testimony about what Mr. Rouse did.

And Mr. Yarborough's statement itself corroborates their testimony as to what Mr. Yarborough said.

And ladies and gentlemen, finally, after considering all of that evidence, after trying to put yourself back in the place of those witnesses, thinking about what happened, what they said, the believable evidence, I submit to you that there is only one conclusion that you can reach, and that is that Timothy Catlett is guilty of armed robbery, kidnapping, two counts of felony murder.

That Alphonzo Harris is guilty of kidnapping, armed robbery, felony murder, two counts. That Russell Overton, Bo-Bo, is guilty of armed robbery, kidnapping, and two counts of felony murder. That Levy Rouse is guilty of armed robbery, kidnapping, and two counts of felony murder. [91] That Lisa Ruffin is guilty as an aider and abetter clearly, of armed robbery, kidnapping, and two counts of felony murder. That Kelvin Smith is guilty of armed robbery, kidnapping, and two counts of felony murder. That Charles Turner, Feila, is guilty of armed robbery, kidnapping, and two counts of felony murder. That Christopher Turner is guilty of armed robbery, kidnapping, and two counts of felony murder. That Steven Webb is guilty of armed robbery, kidnapping, and two counts of felony murder. And that Clifton Yarborough is guilty of armed robbery, kidnapping, and two counts of felony murder.

Thank you.

* * *

[198] SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
CRIMINAL DIVISION

F-8617-84

UNITED STATES OF AMERICA

vs.

TIMOTHY CATLETT,

Defendant

F-6914-84

UNITED STATES OF AMERICA

vs.

ALPHONZO L. HARRIS,

Defendant

F-8613-84

UNITED STATES OF AMERICA

vs.

RUSSELL L. OVERTON,

Defendant

F-8614-85

UNITED STATES OF AMERICA

vs.

LEVY ROUSE,

Defendant

F-5125-85

UNITED STATES OF AMERICA

vs.

FELICIA A. RUFFIN,

Defendant

F-8616-84

UNITED STATES OF AMERICA

vs.

KELVIN D. SMITH,

Defendant

F-8513-84

UNITED STATES OF AMERICA

vs.

CHARLES S. TURNER,

Defendant

Washington, D.C.
Thursday, December 5, 1985

Carolyn Sargent-Burns, CP, RPR, CSR
Official Court Reporter Telephone: 879-1036

* * *

[234] CLOSING ARGUMENT ON BEHALF OF DEFENDANT ROUSE

MS. McEWEN: May it please the Court. Ladies and gentlemen, on behalf of Levy Rouse, I stand before you at the point in the trial that is the most important for him, at the point in the trial that really is the reason why he is here, at the point in the trial where you perform the most important function in our criminal justice system that a group of people can perform; the function of determining the guilt or innocence of a fellow human being charged with serious offenses.

* * *

[243] Maurice Thomas didn't see anything in that alley; did he? His version of what happened conflicts with the version of Calvin Alston and the version of Harry Bennett. Ladies and gentlemen, we have three versions of what happened before Ms. Fuller even got to the point where she was in front of the garage.

What is the significance of that? The significance of three different versions of something that should have been remembered is that Maurice Thomas saw nothing. Harry Bennett did something to Ms. Fuller that he doesn't want us to know, like maybe hit her over the head with that board himself, which he doesn't attribute to anybody else. And, Calvin Alston was intimately involved, not just in what happened in

the garage, but also what happened in the very beginning of that alley.

Calvin Alston, himself, gave the version of that [244] abduction from the street that was corroborated by the medical testimony. Dr. Bray testified that there was an area on Ms. Fuller's face where there was a pattern that was consistent with her being struck by a weapon that may have been a piece of wood and, also, that same piece of wood might have been what caused those massive head injuries from which Ms. Fuller might have died, alone.

Calvin Alston knew what happened to Ms. Fuller as soon as she got into that alley, because it was Calvin Alston that hit her with that stick, and not my client, as he testified.

The medical testimony corroborates this theory. Dr. Bray testified that he could have no opinion as to whether a certain number of people caused those thirteen injuries from which Ms. Fuller died. He couldn't say that there were eight people who killed her, thirteen people who killed her, five.

As far as the testimony of. Dr. Bray is concerned, Ms. Fuller could have been killed, could have been beaten, could have been kicked, could have been struck with a board by only one person, one individual, ladies and gentleman; the illusion of a gang killing, a group effort.

It doesn't even make any sense. You don't leave your common sense at home, ladies and gentlemen, when you become jurors. Why would ten to thirteen people say, "Let's [245] participate in a robbery on a public street before dark," and then go over in a group and do it? That doesn't make any sense at all; does it? Because that means less money for each one of them, as far as

the proceeds of the robbery is concerned. And, secondly, it means there is more of a likelihood that they will get caught, that they will be convicted, that they will be discovered.

Isn't it much more likely that that robbery was actually not just the idea but also the act of a small number of men? How did Ms. Fuller get into the garage? Calvin Alston came up with different names at different times as far as how it was that Ms. Fuller got into that garage; didn't he?

Where did he get those names from? He was asked, "Why is it that now on the witness stand here in this trial, you are saying these two names as far as who transported Ms. Fuller into the garage and down that alley, and then in the Grand Jury – well, when you talked to the police, you had another set of names?"

What was it that Calvin Alston said to that? He said, "I just took the names out of the air, the first names that came to my mind."

He was asked, "Where did you get the names Levy and Monk from? Why did you say that?" He said, "Levy and Monk had put my name into it. I wanted to get the weight off [246] of me and onto somebody else. I wanted to put the weight onto my co-defendants."

Why did he want to do that? He answered that question himself on the witness stand. "Because the police, when I was arrested – and I didn't even know that I was under arrest, I thought I was just going down to get questioned, I didn't even know that I was under arrest. They came to my house, took me over to homicide, started asking me questions about what happened. Told me they didn't believe me when I told them I didn't know anything.

"And then they drew a pie and told me, 'This is it. This slice of pie right here, this slice is you. And then, well, the rest of this pie, that's the other people. That's the co-defendants. That's, the others.'"

What does that mean to Calvin Alston? He said that to him that meant that he could take all the weight himself, or he could give it to others. Well, presented with that kind of a choice, what is it that he's got to do? Of course he's going to say, "I did very little, and I saw all these other people doing these horrible things." That's what he did.

He did it for such a long time and in such – what he thought was such a great way that he was surprised when they took him downstairs and he saw those bars. You remember I asked him, "When was it that you realized you [247] you weren't going home?" He said, "When I saw those bars downstairs." I asked him, "Well, did you think that what it was that you told to the police before they took you downstairs – did you think that what you said to them would have had you going home that day?" He said, "Yes."

Ladies and gentlemen, he thought that he was taking the weight off of himself and putting it on somebody else. And that's what he still thinks; isn't it? That's what he still thinks; isn't it? Because he did not say, "I was the one who did this to that woman." He didn't testify to that. He didn't say, "I was the one with the pole."

He didn't say, "The very violent and evil thing that I did, the terrible thing that I did was this to that woman." He said something totally different as to his own activities; didn't he? A reason not to tell the truth.

Get the weight off himself. A deal with the Government as far as his own sentencing is concerned. A deal with his image as far as what kind of person he is.

He says, "I'm a man." And he was asked, "Were you a man when you were kicking and punching Ms. Fuller?" His answer was, "Yes, I was a man. I did something foolish." He was asked, "Foolish?" And he said, "I did a very violent and evil thing."

He himself testified that he expects to be punished because of what he did. But what does he also expect? He [248] also expects to erect an illustion that would serve the purpose of him not being punished as much as he should be, and the illusion is that somebody else did the most horrible thing to Ms. Fuller in that alley.

How is it that Calvin Alston has insured, as far as he's concerned, that his illusion will be believed? Carrie Eleby and Linda Jacobs, the two witnesses who testified, "I spent the night at Calvin Alston's house before he was arrested." Calvin Alston was arrested on November 29, 1984; wasn't he?

Carrie Eleby and Linda Jacobs both testified that they went over to his house. Carrie Eleby had a conversation with Calvin Alston about the murder, she told the police; didn't she? This was about two weeks before Calvin Alston was arrested.

Linda Jacobs, Smurfette, said, "I was in the car on that night when we were coming back from Cherry's, the go-go, at around two or three in the morning. Calvin Alston, yes, was in that car. We were there in his house all night."

Wasn't that when Calvin Alston seized the opportunity to assist in the erection of this illusion that he was not the one who did the worst thing in that alley;

so, therefore, he should not be punished as badly, as, horribly as he should be?

[249] Carrie Eleby's version of what happened in that alley, I submit to you, is Calvin Alston's version. She went to the alley, she says, but she didn't say that to the police initially; did she?

"I went to the alley and I don't remember seeing Calvin Alston there at all." Same thing Smurfette says. Where was Calvin Alston when Carrie Eleby and Linda Jacobs were in the alley? Calvin Alston says, "I was there." Carrie Eleby and Linda Jacobs say, "No, we didn't see him."

Carrie Eleby says that the reason that she went into the alley was because she heard a scream. When she got to the alley, she did not go into the garage, ever, at all. She stayed by the fence. What she saw was not Ms. Fuller being struck with a board or a stick; not Ms. Fuller being padded down and then hit. She saw somebody that she didn't even know was a female. She just guessed it was a female because of the rollers that were on the ground.

What was it that Carrie Eleby remembered as the only thing that she did see? The only person that, with any kind of sure testimony that she did see in that garage with the pole was Levy Rouse, my client. But, ladies and gentlemen, this same witness testified that she went straight from that alley where that fence was, that she left Levy Rouse in the garage, not standing up. He wasn't standing up. There was a group of people around. She left Levy Rouse. [250] He had the pole in his hand.

She immediately walked to the bus stop. "Did you take a detour?" "No." "Did you go anywhere else between the time that you were in the alley to the time

you got to the bus stop?" "No." "Did you run to the bus stop?" "No.'

Who does she see when she gets to the bus stop? Who is at the bus stop before Carrie Eleby even gets there? Levy Rouse, she says. She testified. "Was he breathing hard?" "No." "Was he perspiring?" "No." "Was he looking nervous, upset?" "No." "Anything unusual about him?" "No."

"What was he doing at the bus stop?" "Well, he was talking to somebody when we got to the bus stop." "Well, had he just started talking to that person?" "No. When I came upon him, when I got to the bus stop, he was already engaged in conversation with somebody."

"What were they talking about?" "Um, nothing unusual. Levy Rouse was talking about taking a trip out of town. He was talking about getting a [illegible]." A normal conversation; wasn't it?

* * *

[192] SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
CRIMINAL DIVISION

F-8617-84

UNITED STATES OF AMERICA

vs.

TIMOTHY CATLETT,

Defendant

F-6914-84

UNITED STATES OF AMERICA

vs.

ALPHONZO L. HARRIS,

Defendant

F-8613-84

UNITED STATES OF AMERICA

vs.

RUSSELL L. OVERTON,

Defendant

F-8614-85

UNITED STATES OF AMERICA

vs.

LEVY ROUSE,

Defendant

F-5125-85

UNITED STATES OF AMERICA

vs.

FELICIA A. RUFFIN,

Defendant

F-8616084

UNITED STATES OF AMERICA

vs.

KELVIN D. SMITH,

Defendant

F-8513-84

UNITED STATES OF AMERICA

vs.

CHARLES S. TURNER,

Defendant

Washington, D.C.
Friday, December 6, 1985

Carolyn Sargent-Burns, CP, RPR, CSR
Official Court Reporter Telephone: 879-1036

* * *

[425] REBUTTAL CLOSING ARGUMENT
ON BEHALF OF THE GOVERNMENT

MR. GOREN: May it please the Court. Ladies and gentlemen of the jury, as you have probably seen, I have been sitting over here writing furiously on several note pad writing down some of the arguments of counsel so I could address you again. I promise not to take too much time. You have to leave at five, so that is about three hours. I won't go on that long.

You have seen for the past twenty some odd days the most important testimony, the most important evidence, the evidence. And it is really that that will guide you when you go back into the jury room when making a decision in this case.

For the past three days you have heard the lawyers discuss, argue this case, discuss and argue the evidence to try and give you some guidance on how to view it, how to judge it, and how to decide who is telling the truth, how to decide what happened over a year ago on October 1, 1984.

And as you have heard some of the objections about people expressing – lawyers expressing their own personal opinion, our opinions don't count. It's yours that

counts, your judgment that counts. That counts very heavily now.

[426] They are important not only for the Government but for the ten men and – nine men and one woman who sit before you.

The police in this case did intensively investigate. The investigation began at 6:18 in the evening on October 1st. It involved a number of police officers who arrived on the scene. It involved an intensive look at this garage, sifting through every piece of trash, everything that could conceivably be thought of as a weapon, attempting to identify anything, anything that would assist them in bringing the individuals who killed Catherine Fuller here to this courtroom so that you could make a judgment.

And they were unsuccessful. They talked to hundreds of people. There were a number of police officers who spent most of their time attempting to solve what was then the mystery of the death of Catherine Fuller. They were careful. They were as thorough as they could be with the knowledge they had. They weren't perfect. Who is? What investigation would be? You would probably not believe it if anybody argued that it was perfect.

And it's true, there was no physical evidence to link, anybody to Ms. Fuller's death. There was no fingerprints found that could be used to identify who had killed Catherine Fuller. And you've heard all the reasons [427] for that. You've heard how it was wet, how it was dirty, how it's impossible to take fingerprints off of those kinds of surfaces.

You've heard how, unlike what one of the lawyers, believe, suggested was the evidence, one of the officers looked at this entire door in this area attempting to get

fingerprints and found one somewhere up here that was not sufficiently preserved so that any identification could be made.

You heard some discussion and some questions about whether fingerprints were attempted to be taken off the sweater and the umbrella. You heard the officers and the fingerprint examiner testify that nobody can do that, the suggestion being, perhaps, "Well, if the police had looked harder, they could have solved this crime."

The police looked as hard or as careful as they could be. They went so far as to attempt to get fingerprints off of Ms. Fuller's body, a technique that is experimental and has never been successful.

You have heard discussion about how there were a couple of hairs that weren't Ms. Fuller's found on some of her clothing, and how none of those hairs were these defendants. Well, as you heard when that stipulation was read in, Calvin Alston's hairs were also submitted, and none of those hairs were his hairs. But he admitted [428] that he helped kill and rob and kidnap Catherine Fuller.

The hairs prove nothing. It's a smokescreen. It's an attempt to get you to look at things that are not important in this case, to divert your attention from the real believable evidence in this case.

No, there was no blood evidence. There was no property discovered. There were no footprints. Look, look at the garage floor and how dirty it is. Do you see any footprints? Do you see where anybody could leave a footprint?

All sorts of questions about plaster casting and all sorts of other things. This isn't Perry Mason. This is

real life. A smokescreen, an attempt to divert your attention from the real issues here.

Mr. Elsten suggested to you that the fact that there was no physical evidence affected Mr. Goren's job, he said, affected the investigation, put pressure on the police to do something to find the perpetrators.

They talked to hundreds of people. Nobody came forward. So, they had to do something. What's the suggestion? What is it that Mr. Elsten was attempting to suggest to you that happened in this case?

You will notice that some of the arguments of counsel suggest reasons why you should believe some of the witnesses who testified in the Government's case. And I say [429] that very, very cautiously. The witnesses who testified in the Government's case, not the Government's witnesses, but the witnesses who testified in the Government's case, the people who testified in that case were people just like the people who committed this murder.

They were their friends. They were their girlfriends. They were their neighbors. They lived in the same community. And they weren't any different in many ways. They weren't the Government's witnesses. They were the witnesses who saw what happened that day.

Some of them, defense counsel argued, are believable. They're the good witnesses. Some of them shouldn't be believed. Well, you think over the ten arguments you've heard and try and decide who the believable witnesses are and who the ones who aren't believable are.

"The believable witnesses are the witnesses who didn't say my client was there. The unbelievable witnesses are the witnesses who say my client was there."

It's not the manner in which they testified or how they acted. It's whether they identified Timothy Catlett or Alphonzo Harris or Levy Rouse or any of the other defendants as to whether they should be believed or not.

You heard some people argue, "Melvin Montgomery is most believable. He didn't see my client out there." And you've heard, "Melvin Montgomery is confused and wrong [430] about days. He's out there every day. He identified my client. He's wrong."

You heard that about Carrie Eleby and Mr. Thomas, Maurice Thomas. You even heard from one of the lawyers that Calvin Alston should be believed because he said something that was helpful to his client. Believe the people who help me. Don't believe the people who hurt me. That's totally wrong.

MR. ELSTEN: Your Honor, may we approach the bench? We have an objection that should not be stated in front of the jury.

THE COURT: Come to the bench.

(Whereupon, counsel approached the bench and conferred with the Court, as follows:)

THE COURT: What?

MR. ELSTEN: We have frequently moved for grounds for severance. My client could not get a separate trial. If Mr. Goren is allowed in closing to say one lawyer said one witness was good and another lawyer said another witness is good, they are in conflict if he's going to argue, because the way the different lawyers handle themselves, some saying a Government witness was good and some saying that it was bad, that my client is one of a group of incredible lawyers, lawyers that should not be believed –

THE COURT: He didn't say the lawyers shouldn't be [431] believed. He didn't make any statement whatsoever.

MR. ELSTON: I defer to Ms. Roberts who may be able to impart the legal objection somewhat better.

MS. ROBERTS: My objections is this, is rebuttal. If Mr. Goren is going to rebut individual arguments of counsel, he should do that and go down the line. I certainly object to his suggestion that the lawyers, even though he is not specifying which lawyers he is referring to, the lawyers – I represent Mr. Harris. If he wants to rebut what Mr. Harris said in closing argument, let him do that. I think it is inappropriate in a case where we are all telling the jury we have separate trials going on here. Mr. Goren should argue what the lawyers did.

It sounds like it is some concert or agreement what the lawyers would be. Let's rebut the cases down the line and get out of here. That's the appropriate way to do it.

MR. GOREN: First of all, these arguments are building up to arguments of credibility of witnesses, not credibility of millions of defenses. We will be here for days if I don't combine some of the arguments.

Some of the arguments were the same about Mr. Alston. I will be careful not to suggest the cases should be judged in any way other than independent – independently of one another.

[432] THE COURT: Please do.

MS. McEWEN: If we could not an objection, Your Honor. Your Honor, Mr. Goren –

THE COURT: What?

MS. McEWEN: Mr. Goren, in his argument, made a statement, "You have seen the most important evidence." Then after that he said, "You have seen the evidence." I object to that kind of inference to the jury that there is other evidence in this case that they have not seen.

And there is one other point that –

THE COURT: I didn't draw any inference like that.

MR. GOREN: I didn't intend it.

MS. McEWEN: I would object to any further kind of commentary in reference to any other evidence that the jury has not seen.

THE COURT: He hasn't mentioned anything about any other evidence.

MS. McEWEN: He said, "You have seen the most important evidence."

THE COURT: He has shown what the people have seen, the evidence, which is the most important thing.

MR. GOREN: I think what I was trying to do is just a motion to argument.

MS. McEWEN: There is one other matter. That is, in Mr. Goren's closing argument, as opposed to rebuttal, [433] he made a statement that six witnesses have identified my client. Only five have identified him, and I believe –

THE COURT: Well, you pointed that out, I presume.

MS. McEWEN: I believe he may have been referring to the videotape of Clifton Yarborough.

THE COURT: No, ma'am.

MR. GOREN: I was referring to Montgomery, I believe, as the sixth.

THE COURT: You had a chance to address that.

MS. McEWEN: I would object to any reference at all, any inference that my client was identified in a videotape of Clifton Yarborough.

THE COURT: I don't think he is going to do that.

MS. McEWEN: Thank you.

(Whereupon, the proceedings had at the bench were concluded; counsel returned to their seats at counsel table, and the trial was resumed, as follows:)

THE COURT: Continue, Mr. Goren.

MR. GOREN: As you have been told many times, this is really in some ways ten separate trials.

MS. ROBERTS: Objection. It's in every way ten separate trials.

MR. GOREN: It is ten separate trials in the sense that you have to make a judgment about each of these [434] defendants independent of the others. And a decision about the charges against each of these defendants is separate from each of the others.

But it's not separate in some ways. Let me explain to you what I mean by that. It's the same testimony, the same witnesses that you have heard from from which you have to make these independent judgments. You know that because each of the lawyers, in arguing their own individual case, has said quite clearly that Harry Bennett and Calvin Alston and some of the other witnesses are not to be believed.

A lot of the arguments that you have heard are the same kinds of arguments attacking what is called credibility, the believability of some of those witnesses.

And the credibility of those witnesses should be discussed separately and you should think about that. I'll do that with you, too.

Ms. McEwen said, "You have to decide this case, what happened and what didn't happen; who was truthful and who was not truthful." She certainly is right. You do, and you will.

But you can't view each of the witnesses independent of each of the other witnesses, because, in fact, when you look at their testimony as a whole about the events, the events that they described, the kidnapping, [435] robbery and murder of Catherine Fuller, you see that they are not independent; that they corroborate each other in substantial ways; that the events that they are describing is the same events and are real events.

One thing that won't help you in deciding who to believe and deciding the credibility of witnesses is basing your judgment on names and name-calling. Dope dealers, dealmakers, perjurers, human garbage, street criminals, liars.

If you want to decide what kind of witnesses these are, you can do that. You have heard Calvin Alston and Harry Bennett called murderers, killers. Ms. VanSusteren, said the killers said this and the killers said that; the murderers. That's right. That's right. And anybody who participated in that crime is a murderer and a killer.

Any name that they were recalled about what they did that day applies to anybody who participated in

that act. So if they are killers and murderers, then remember them as such. But they admitted they killed.

You will be given an instruction on some of the factors that you can consider in deciding who to believe. You will be told that you have – you could look at the demeanor and the manner in which somebody testified on the witness stand, and you should because it's important. It tells you a lot; doesn't it?

[436] Whether they impressed you as a truthful person, whether they seemed to have an accurate memory about what happened, whether they had a motive for telling the truth or not telling the truth, whether they were biased in any way for the Government or toward other parties, toward other witnesses or toward the defendants or any one of the defendants.

You could look at, you will be told, the reasonableness or unreasonableness of what it is that people testified to, the stories that they told you, the versions of various events that they told you about.

You can look at the probability that things happened the way they were testified to, or the improbability of those events. You will be told that you can consider the extent to which the testimony of a witness was corroborated, was supported by other evidence in the case, by other testimony, by physical evidence.

And you will be told to think about who to, believe. You can make judgments about whether the inconsistencies, the contradictions that you find are explainable or explained, whether they are important or unimportant. And hearing all of that, you will have to do as each of the lawyers has suggested you must do. Decide whether or not and the extent to which you

should believe Melvin Montgomery, Harry Bennett, Calvin Alston, Carrie [437] Eleby, Linda Jacobs, Maurice Thomas, and the other witnesses who testified in this trial about the involvement of these ten people in the murder of Catherine Fuller.

And you should also, shouldn't you, use your common sense, as all of us must and all of us have, in understanding their testimony, in evaluating their testimony, in taking what they say in this courtroom and trying to picture whether they're remembering a real event, how they're remembering it.

And as I said several times before, suggested several times before, think about who they are, the participants, the girlfriends, the neighbors. Think about the event itself, how quickly it must have happened, how fast it must have happened, the movement involved in dragging Ms. Fuller into the alley.

Mr. Elsten, I believe, described it as – like piranha, like fish, coming and jumping at a body from one place to another; coming in and striking and leaving, other people striking, pushing aside. Think of that event when you make a judgment about Calvin Alston's testimony and Harry Bennett's testimony.

Think about how many people must have been there. You have heard the names of some twenty people. And you have also heard that there were people there. Some of the people who witnesses it don't remember, don't know, [438] can't name others.

These were people who didn't know each other, all of them. They didn't know all of the participants. They didn't know all of the defendants.

Think of the roles in which some of the witnesses said they played; two of them involved in the murder

itself, the beating, the robbery. One of them Melvin Montgomery, just sitting out in the park up until the time this happened, not an extraordinarily different day for him.

Carrie Eleby and Linda Jacobs, interested in one of the defendants, entering that alley at a later time, seeing what they could see. You have to take yourself back there in their shoes and see it the way they did in order to evaluate what they told you on the witness stand.

You have to see it from the point of view of someone who didn't know everybody who was back there, who didn't pay attention to everything that was happening, whose attention was focused on looking for a boyfriend or what Mr. Rouse was doing, on the fight, on the excitement.

You have to take into consideration the fact that Carrie Eleby and Linda Jacobs said that they were using PCP that day and how that affected their ability to perceive this event.

It's not a neat picture. It's not a neat event. [439] It was brutal. It was fast. The people who witnessed it were some of the people who participated in it. And think about that in terms of how you view what they said from there. This courtroom is very different from that alley, from that park, a different setting for those people, as it is different for all of us testifying from a witness stand, being asked questions by twelve lawyers sometimes over a day and a half or a two-day period.

Witnesses who are young, witnesses who are inarticulate, witnesses who quite frankly are not very smart sometimes. Those are just some of the things that you have to think about, some of the things that

you have to do so that you can make a fair judgment about what it is you heard, and a fair judgment about what it is that happened.

Let me talk to you, as I said I would, about some of the witnesses themselves, Calvin Alston and Harry Bennett. You heard a number of times that they got deals; that they made bargains with the Government.

Well, think about those deals, those bargains, those agreements. Think about what it is that it cost Harry Bennett and Calvin Alston to do, and think about it in terms of what they are and who they are and how old they are.

Harry Bennett, who is nineteen years old, may [440] spend as much as 31 years in jail. That's what his potential exposure is, 31 years in jail. That wasn't a cheap deal for him. It's not like he got of scott free. Yes, he's out there now. Yes, part of the deal was that he would not be locked up at that time. He'll go to jail; won't he? He expects to.

It's a judge that's going to make the determination knowing what it is that he admitted he did. Don't you think he's going to go to jail? Don't you think he knows it?

And Calvin Alston could go to jail for the rest of his life. Some deal. He didn't get off scott free, and he never got out. He'll be in jail for anywhere from 15 years to the rest of his life.

MR. DEBERARDINIS: Objection, Your Honor.

MS. VAN SUSTEREN: Objection. That's his exposure. Can we approach the bench?

THE COURT: Yes.

(Whereupon, counsel approached the bench and conferred with the Court, as follows:)

MS. VAN SUSTEREN: What Mr. Goren said, Mr. Alston will be in jail 15 years to life –

MR. GOREN: I thought he said you could. I can correct it.

MS. VAN SUSTEREN: I ask the Court to correct it.

THE COURT: I will correct it.

[441] MR. GOREN: Fifteen years to life is the maximum exposure that Calvin Alston could have, and a judge is going to make that decision based on what Calvin Alston admitted he did.

Lots of discussion about branding these young men. Calvin Alston and Harry Bennett branded themselves. They have labeled themselves murderers, killers, snitches. But that's not the only part of the deal, the bargain. In exchange for that, they agreed to tell the truth, knowing that as a part of the agreement, that if they didn't tell the truth, that they would be prosecuted to the full extent of the law for this crime.

So ask yourself, why would they have a motive to lie? Because you have been told they have a motive to lie. That's why they got up there and told you what they told you, because they have a motive to lie, both Calvin Alston and Harry Bennett.

You have been told they did the best thing for themselves, they have their own self-interest at heart. They tried to stay out on the street as long as they could, cut their exposure as much as they could. They were only interest in themselves.

Well, who wouldn't be? That's not dirty and ugly. That doesn't make them liars. Doesn't it sound smart

to do that? They are out to save their skins. Anybody who is [442] arrested and charged with a crime wants to save his skin. But where is the motive to lie? The agreement said you have to tell the truth. So why isn't the motive to tell the truth? Because if you don't tell the truth, then the bargain is off, and the 31 years becomes everything that Ms. VanSusteren wrote on that board. Thirty-five to life. The bargain's off if you don't tell the truth.

So where is the motive to lie? Well, think about what reasons have been given that these people should lie. It has been suggested to you that they are biased; that they're angry and vengeful; that they're full of hatred and have a need for revenge. Against who? Against who?

And it isn't just these witnesses. Melvin Montgomery, where he identified somebody, motive to lie. Carrie Eleby and Linda Jacobs, motive to lie. Maurice Thomas, a motive to lie. What is Melvin Montgomery's motive to lie on Mr. Catlett? Go back there, discuss it, and see if you can remember one piece of evidence about Mr. Montgomery's motive to lie on Mr. Catlett, or on Mr. Overton, or on Levy Rouse, or on Charles Turner. Think about it, because none was presented; was it?

Derrick, Harry Bennett. There was a motive suggested by Ms. McEwen as regards Mr. Rouse, that he was involved in a love triangle with Trina Ward and that he was attempting to get back at Mr. Rouse because of his [443] relationship with Ms. Ward.

Mr. Seals has suggested that with regard to Ms. Ruffin, it's not a motive to lie on Ms. Ruffin, but Ms. Ward and Mr. Bennett formed the reason for him putting Lisa Ruffin in this, exchanging places with

Trina. We'll talk about that later when we talk about Ms. Ruffin's case specifically.

Ms. VanSusteren suggested he lied because it was in his interest. What about his interest that he should point the finger at Hollywood, at Kelvin Smith? In fact, what about his interest suggesting he should point the finger at Mr. Catlett or Mr. Harris? Why Mr. Harris? Why Mr. Overton? Why Charles Turner? Why Christopher Turner? Why Steven Webb? Why Clifton Yarborough? What was his motive to lie about them?

A reasonable doubt. A reason. Find a reason. What's the reason? I suggest to you that there are no reasons.

Mr. Alston, what reason did Calvin Alston have to lie about these people? Think back. What reason has been given in evidence by anybody testified to why Calvin Alston pointed the finger at Timothy Catlett, or Alphonzo Harris, or Russell Overton, or Levy Rouse, or Hollywood, Kelvin Smith, or Charles Turner, or Christopher Turner, or Steven Webb, or Clifton Yarborough? What reason has been [444] presented why Calvin Alston lied on them?

Carrie Eleby, Linda Jacobs. It has been suggested' that Ms. Eleby had a relationship with Mr. Alston, so she and she was helping him out. So that falls right back on Mr. Alston. Why was she helping him out lie on these people? She had no independent reason; did she? Did she have an independent reason with the one person she had a relationship with, Mr. Smith?

Ms. Jacobs, what reason did she have? To help Carrie out? This lengthy chain of helping people out, but it all falls back on Mr. Alston; doesn't it? And he had no reason at all, at least nothing that is presented to you in evidence.

Now, Maurice Thomas, the only reason, isn't it, that's been suggested why Maurice Thomas would point the finger at anybody is from some suggestion by Mr. Yarborough's counsel that Maurice didn't like Clifton.

We're going to talk about that a little later, too. But why, if he had something against Clifton, would he tell about anybody else? What did Maurice Thomas have against Mr. Catlett, or Mr. Charles Turner, or Mr. Rouse, or Mr. Christopher Turner, or Mr. Kelvin Smith?

Well, if you think about it and if you decide that, "Well, there aren't any reasons why these people would point to these individual defendants," then there must be [445] some other reason for them to lie, some other motive to lie, some other motive to violate the agreement, and by violating the agreement subject themselves to being prosecuted for the whole thing. What is the other reason?

Well, someone else must have wanted them to make up something on these people. Someone else wanted them to point the finger at these ten people, so they did it because they felt they had to for someone else.

Mr. Elsten said that Mr. Goren had nothing to work on, the police had nothing to work on, so they developed a model, and from that model they used it to shake and to shock the witnesses into testifying and pointing the finger at these people.

Okay. That's a suggestion by Mr. Elsten. And implicit in the suggestion is that someone else orchestrated this whole thing. Well, again, we go back to who could orchestrate it? One of the suggestions is the Government the police—we'll talk about that in a minute – or one of these defendants.

Now, very explicitly you have heard some argument that Calvin Alston got together with Carrie Eleby and Linda Jacobs to plot out and plan this whole thing, this testimony about who did it. Because, really, Calvin Alston, Harry Bennett, and Darryl Mercherson are the only three people who participated in this crime. And Calvin, who admitted [446] he did it and who, by the way, admitted everything that – admitted a great deal more than he said in his statement – he didn't just say, "I was just a lookout." He admitted, "Yes, it was my idea. I could have been the lookout. I could have just sat there as Clifton Yarborough asked me to do. But I participated in the whole thing. Yes, I kicked Ms. Fuller many times. I beat Ms. Fuller many times. I went into that garage. I stood there while Levy Rouse inserted that pole in her rectum. I did all of those things, and I got money."

Having admitted all of that, the suggestion is that he got together with Carrie Eleby and Linda Jacobs to contrive this testimony. Well, you have to go back and think about the timing of all of this, because if he did that, he had to do it before November 29th when he gave his statement, a statement that he admitted was not totally true. Some of it he said was true, but the parts about him, not true at all.

It had to happen before November 29th when he gave his statement. Well, what you have to believe then is that Carrie Eleby and Linda Jacobs – Carrie Eleby, who I think you saw had a hard time reading, and fourteen year old Linda Jacobs, got together some night – the suggestion was the one time they saw each other was in Calvin Alston's basement after coming back from Cherry's, so they said they [447] spent the rest of the night together.

Now, picture it because you have to picture it to believe it, that the three of them got together two weeks after the murder or some weeks after the murder and a few weeks before Calvin got arrested. Of course, he didn't know he was going to be arrested; did he? He didn't know he was going to be caught. Nobody knew.

They got together in that basement and they talked about, "Well, Calvin, you get arrested, we are going to make up this story. We're going to name these people and we're going to say we came in in the middle of it. You, of course, are going to give a statement when you get arrested, and you're going to sit in jail for 13 months and not do any kind of plea bargaining or anything else until the last minute. And we – sometime in the middle of the summer we'll come up and tell the truth at that point, or say we're telling the truth."

Can you picture that, them getting together? And then, of course, what did happen? Carrie Eleby, on November 29th, went down and talked to the police. And she told you that she said she told Detective McGinnis what it was that Calvin Alston told her.

And on cross examination or redirect examination it was brought out that this whole thing was two or three lines. That's how much he told her. And what happened that [448] night, November 29th, the day that Carrie Eleby went down and talked to Detective McGinnis? Calvin Alston got arrested. Well, why do you think he got arrested, ladies and gentlemen? What information did the police have on the night of November 29th that led to his arrest?

Well, it was the same day that Carrie Eleby went down and talked to the police. Isn't it natural to

assume that's why he got arrested? It makes no sense to think that Calvin Alston, Carrie Eleby and Linda Jacobs got together and thought up this whole plan. They couldn't have. They're not smart enough.

As Mr. Elsten said before, these are street people, he said, people who don't think of tomorrow.

Well, then the other suggestion is that Harry Bennett got together with Trina Ward and concocted a bunch of this story, too. That Harry Bennett and Trina Ward were very, very close throughout this period. Well, you heard Trina Ward testify that on the same day she gave false testimony about Mr. Rouse, testimony that did not say there was any blood on his pants, testimony that's confused because she was thinking, "I don't want to talk about that," that same day she told the Grand Jury and the police about Derrick, about Harry Bennett. Don't you think that formed some of the basis for arresting him?

She protected Levy, not Derrick, but Derrick and [449] Trina supposedly got together to get revenge on Levy. That doesn't make any sense.

And not only you have to believe they got together, but somehow they all got together. After concocting these stories, they all got together so that they could come here at this trial and present that testimony. Now, that's one of the theories that you have to believe if you think they worked out this whole scheme, if you think that they had a motive to lie based on this scheme that they worked out in the past.

And they came here and told you a story that if you think about fits together very realistically; doesn't it? Now, you have been – you have heard the story told by a number of witnesses. You've heard a number of

lawyers retell the story. I'd like to tell it to you one more time, slowly, not in great detail.

But think about where the various people were as this murder, as this kidnapping, as this robbery unfolded. Think about where they were, what they were doing, who they were with, what they were thinking, because that's the only way you can understand why they saw what they did and why they didn't see some of the things that they say they didn't see.

They were all in the park together. Some people were more active in talking about the robbery; Mr. Alston, [450] Mr. Rouse, Mr. Overton. Carrie Eleby and Linda Jacobs were not there. Maurice Thomas was not there. Mr. Bennett arrived and was there. He was sitting down, he said, on a bench. The others were behind him, talking, some of them singing, Steve Webb ganging on a trashcan by the phone booth.

When they saw Ms. Fuller, a number of them went across the street, according to their testimony, to 8th Street. Some went to 9th Street. Lisa Ruffin was somewhere behind them with a group of other people.

Mr. Bennett said he followed them. He went after the first group went to 9th Street behind Ms. Fuller and some of the others went the other way. He followed them. Now, Calvin Alston said, "I didn't see Harry Bennett there." Yell, Calvin Alston arrived after 4 o'clock, was paying attention to this robbery and talking to Levy Rouse. Maybe he didn't see Harry Bennett. He certainly see him follow him into the alley because he was behind him.

Calvin Alston said, "I didn't look behind me. I was looking ahead of me." And once he got into the alley, he actively participated in beating Ms. Fuller. He wasn't paying attention to who was there and who was

around him or who else was beating on her. He saw some of it. He described some of it. He told you what he remembered. But it's not unreasonable to believe that he didn't see [451] Mr. Bennett. Maurice Thomas did later on.

Mr. Montgomery, who said he saw some of this but not all of it, was sitting a bit aways under a shed. At the time that they left the park, he only looked over briefly, and he heard someone say, "Let's get that lady there," and he saw the four people that he remembered being there all afternoon, and others that he said he might have remembered or had known them but he doesn't remember them now.

They went into the alley. The beating began. They dragged Ms. Fuller down the alley. It was about this time that Maurice Thomas, Carrie Eleby and Linda Jacobs come up. They didn't see what had happened before.

You heard a number of questions. "Well, did you see a vendor? Did you see this? Did you see anybody banging in the park?" They weren't there then. They couldn't have seen it. Those were not contradictions.

When they got there, Ms. Fuller was already down to the cut. From where Mr. Thomas was at the end of the alley – I'm sorry, ladies and gentlemen, I can't find that picture. From where he was at the end of the alley, looking down the alley from across the street, he couldn't tell exactly where everybody was. He said that they were up here near where the garage and yard met, Shontel's yard up here. He saw them from way over there, not far from the [452] area where everyone else said they were. That's not a discrepancy.

You have to understand what he saw from where he was. if you think about what happened, if you think

about the testimony in terms of where people were, when they got there, what they were paying attention to, what caught their interest, what role they were playing, what you heard fits together very realistically; not perfectly, because it wasn't the kind of event that anybody could record and remember perfectly, but it fits together very realistically.

And what you have when you hear that story is a very realistic telling by some very unsophisticated, inarticulate, not very smart people about what happened in that alley that day.

Now, I suggested to you that in order to be able to support the contention that Harry Bennett and Calvin Alston lied, you have to come up with some reasons for motive for lying. And one of them was that they created this story and that these witnesses all have reasons to lie on these people.

We discussed why that doesn't make any sense. There's one other option that's been suggested here and it's the one that I referred to before. It's the police that created this story. It's the police that put pressure on Harry Bennett and Calvin Alston to come into this [453] courtroom and point the finger at these ten people.

Let me just very briefly ask you some questions. If the police or the Government was going to try and create a story, create an event like this, why did they make it so complicated, so complex? Why not two or three people, or five? Why create an event in which it is suggested there were some twenty people there? Why include a young woman like Ms. Ruffin?

And if we're going to include a young woman, why do it – give her such a small role? Because, being very candid with you, her role is the smallest in that she

didn't beat or kick Ms. Fuller. Why not have more people identify some of the individuals here on trial? Why not have it match perfectly?

Most importantly, why these people? There is no reason in evidence or otherwise that would give you grounds to believe that the Government or the police would concoct a story against these people or at all.

Just a few more words about Mr. Alston. He has been called a liar. Mr. Bennett has been called a liar. The only reason anybody can call them a liar here in this court is because Calvin Alston said, "I lied. I lied when I gave my statement to the police about my own involvement and some of the people that I was friendly with. I did it because I wanted to get out on the street. I did it [454] because I had my own interest at heart."

That's the most human, understandable response anybody could ever give; isn't it? He wrote letters to Commissioner Queen in which he said, "I didn't do anything. I want a bond. I want to go home." Well, he did want to go home. He wants to go home now. Anybody who's in jail wants to go home. Anybody who's charged with a crime wants to go home.

And he lied about it. What did you expect him to do? Dear Commissioner Queen: I did a terrible, brutal crime. Would you give me a bond, please? He wanted to go home.

He was assaulted in the jail. He was brutalized in the jail. He was frightened. He was threatened again after that by the people that he had accused of doing it. He was alone there. He was nineteen years old. And out of fear he said he wrote some letters saying, "I made a mistake. It wasn't them."

But he came in here and he told you why. And didn't he explain it in a way that's understandable, that he was afraid, that he was alone?

Mr. Bennett has admitted that on the day he was arrested he gave a statement in which he didn't tell the truth. He lied to keep himself out of it. He was arrested and charged with murder, and he didn't want to put [455] himself in it. He admitted that to you. He is only called a liar because he said and admitted, "I lied about my own involvement, but now I'm telling the truth."

Both men were ridiculed; weren't they, for coming to you and saying, "I feel bad about it now. I feel remorseful now. I did an awful thing. I did a terrible and evil thing." They said it. And everybody said, "Don't believe that. Did you hear that? Don't believe that.

"Well, what if they didn't say it? You see that? They said they did it and they don't feel any remorse at all." They can't win. Damned if they do, damned if they don't.

Why is it that they should be ridiculed and judged harshly for feeling what they should feel, that they did an evil, horrible thing, as did everybody who participated in that murder and kidnapping and robbery that day?

Very briefly, Carrie Eleby, a perjurer. Well, what did she lie about? What did she perjure herself about? She lied about Kelvin Smith in the Grand Jury. She is called a perjurer because she went into the Grand Jury and she tried to protect Kelvin Smith by saying, "He didn't do anything that day."

And she admitted that. And she was pregnant with his baby, at the very least a baby that she thought was his, [456] that she felt was his and that she still believes is his. She went with his mother, didn't she say – and didn't his mother admit it – to go visit him in the jail at some point after he was arrested because she thought she was carrying his baby? So she lied. She's a perjurer, because she went to protect Kelvin Smith.

If anything, if she has any bias at all, that demonstrated what her bias was. Bias for Kelvin Smith, not against him.

And what reason has been given to suggest as to why she changed her mind now? Is there any? That she is in love with Calvin Alston or for Calvin Alston, Calvin Alston who she told the police about?

Calling her one of the PCP twins doesn't help you make a decision about her or Linda Jacobs. They knew they had some PCP that day, and maybe it helps you understand why they saw what they said they saw or didn't see what they said they didn't see, why their attention was only focused on that event at the time they saw the horrible thing that Levy Rouse was doing to Ms. Fuller.

How to Linda Jacobs it was perhaps a carnival of sorts, a fight like at the Coliseum, until she saw what was happening in that garage. It was at that point that they sobered up and left, not paying any attention to what was going on until they saw that, and then they [457] left.

Perhaps that's the reason that Carrie Eleby doesn't recall or, in fact, as Mr. Elsten suggested, wants to distance herself from that garage, wants to say that she stood somewhat outside it over here near the fence

instead of over here near the door where Linda Jacobs said they stood; not wanting to face the reality that she was there and saw that whole thing and did nothing and kept quiet for a long time about it.

One thing you should note, shouldn't you, is that neither Melvin Montgomery, Harry Bennett, Calvin Alston, Linda Jacobs, Carrie Eleby, or Maurice Thomas ever waivered when they were asked about what happened in the alley. Substantially consistent throughout their testimony about what they saw that day.

And finally, in thinking about their own testimony, their testimony is corroborated substantially by the scene, the physical evidence, the finding of all that property in the garage where they say – where Calvin Alston says Snotrag, Mr. Catlett, Clifton Yarborough thought of that purse, the purse was there, where Ms. Fuller's clothes were removed, her clothes were found there.

The injuries described by the medical examiner corroborates, supports everything that you heard about what happened; the number of bruises and injuries, the nature of [458] the injuries, some caused by kicking; the patterned injury on the face, a board, a boot; the shattered liver, the kind of force or number of blows that would be required to do that; the punctured lung and broken ribs; the bruises and injuries about the head. All consistent with the testimony.

And thinking individually about some of the defendants, the corroboration that Mr. Yarborough's statement gives to the testimony about Mr. Yarborough. The corroboration given by the testimony of Trina Ward to the other testimony about Levy Rouse.

The corroboration given by Kaye Porter hearing Mr. Catlett say, "I just kicked the lady. Someone else stuck the pole in her." The statements that were overheard by Maurice Thomas that, "We had to kill her. She recognized someone," as they relate strictly to Mr. Catlett's case.

Mr. Overton and Mr. Christopher Turner, the statements that Detective Villars overheard.

I wold submit to you that what you have heard from those witnesses was a description of a real event by the real people who were there; that it fits together, it's realistic, it's believable. And that no reasons have been suggested that deserve more than a passing thought as to why those people would lie on these people, or lie at all.

[459] Now, you also have to think about the testimony you heard from the witnesses presented by various defendants, and think about some of the arguments that really apply only to individual defendants.

In the case of Mr. Catlett, you have to make the same judgment about Kaye Porter and what it is she heard Mr. Catlett say. Being very brief about it, what reason did Kaye Porter have for coming in here and telling you about what Mr. Catlett said that day if it wasn't true? Why would she make it up on Snotrag, on Mr. Catlett?

Pointing to the fact that she can't remember what she said in the Grand Jury, or she doesn't recall the exact words, but she said, "I think this is what he said." That doesn't tell you the most important thing is why would she come in here and say that this person said that to her. There's only one answer, and I would submit that's because it's true.

THE COURT: Mr. Goren, would this be a convenient time to take a break?

MR. GOREN: Yes, this would be fine.

THE COURT: Ladies and gentlemen, it's now ten to three. Let's take a break for ten minutes. Again, keep an open mind. Do not talk about the case amongst yourselves. I'll see you back here in ten minutes.

(Whereupon, a brief recess was taken.)

[460] (Whereupon, the jurors entered the courtroom.)

THE COURT: All right.

Let the record reflect that the ladies and gentlemen of the jury and the alternates are back, all of the defendants, defense counsel and Government counsel.

Mr. Goren, would you continue, please?

MR. GOREN: Thank you, Your Honor.

Ladies and gentlemen, again I am going to try and be brief, but I want to talk to you a little bit about some of the individual defenses.

Now, we very quickly took a look through Mr. Harris window the other day, and we need to take another look in that room because there were some things that were missed. One of the things that's most important in looking in Mr. Harris' window is to be clear about what it is we see, what is not evidence of Mr. Harris being there or not being there.

I didn't want to overstate that, but Ms. Roberts said that Mr. Montgomery, Mr. Thomas, Ms. Eleby and Ms. Jacob did not see Alphonzo Harris there, and that's true. They didn't. But that doesn't mean that he is not there or was not there.

Mr. Thomas didn't say that Monk was there, Mr. Harris was there. He doesn't know Monk. But he did say there were other people there back behind the group that he [461] saw.

Ms. Eleby and Ms. Jacobs both saw a number of people who they didn't know back in the alley. Mr. Montgomery saw a lot of people in that group who he either didn't remember or couldn't identify.

Mr. Raspberry and Mr. Vincent Gardner, Boo and Bey-Bey, who were at the alley later on that night, didn't see Monk out there. Doesn't mean that he wasn't there.

And when we talk a little bit about what perhaps happened with regard to Mr. Harris that day, maybe it will become clear as to why some people might have seen him and others not.

There are some pieces of evidence that you have to make a judgment about how important they are, and I would suggest to you that there are some things that are made a great deal of that are unimportant.

Mr. Freeman, the vendor, went to the lineup and picked someone other than Mr. Harris out of the lineup as being somebody who might have been running through the alley an hour and a half after the murder. Remember, Mr. Freeman walked in the alley, and after the police were called and after he went back in the alley, he saw some people running up from 9th Street toward him around the garage. They didn't go in. They didn't look in. They didn't come from the garage. And they ran away when the [462] police came.

Well, what does that have to do with Ms. Fuller's death? Nothing. What does the fact that Mr. Freeman

looked to see who those people were and couldn't say, that one of them was Monk have to do with Ms. Fuller's death? Nothing. A smokescreen.

How can it be that those people were there and didn't see Mr. Harris? They did see other people they didn't know or couldn't recognize. There were twenty or more people back there. Their attention was not on everybody. They didn't know Mr. Harris. There's all sorts of explanations –

MS. ROBERTS: Objection, Your Honor. That's not the evidence.

THE COURT: When there is an objection, stand, please, Ms. Roberts.

MS. ROBERTS: I'm sorry.

THE COURT: Ladies and gentlemen, if you hear an objection like that, it is your recollection of the evidence which controls. It is not Ms. Roberts' recollection and it is not Mr. Goren's recollection. It is your recollection that controls.

MR. GOREN: Some of them didn't know Mr. Harris. Most of them, I would suggest, didn't know Mr. Harris. Mr. Harris makes a large point of the fact that Mr. Alston knew [463] him because he played football with him once or twice and that he saw him up around 14th Place. Mr. Alston said, "I don't know where he lives, but he lives up near 14th Place."

Mr. Harris said, "I don't know him. I have never seen him. It couldn't have been me. I didn't play football in 1984 because of two automobile (sic) accidents." You'll look at the records. You heard his answers on the stand. Automobile accident, motorcycle accident; sounds major, but he was treated and released. No stitches, no operation, never stayed in the hospital,

minor injuries. It didn't keep him from playing football because Christopher Turner saw him play football, Kelvin Smith saw him in the streets playing football in September of 1984 when Calvin Alston said he played with him.

Mr. Alston didn't have any trouble identifying him in pictures back in November of last year and knowing his name. Calvin Alston and Harry Bennett knew Alphonzo Harris. Not well, perhaps, but they knew him and they were clear about who he was and what he did that day.

Now, Mr. Harris says, "I wasn't there. I was somewhere else." Let me suggest to you a scenario that the evidence supports very well. Mr. Harris may have been at a friend's house that afternoon. He may have, wherever it is, taken this wire harness off a car that car, this [464] car somewhere up near 9th and Eye Streets, the car which he denied writing Monk on the top of it, Monk of the 8th and H group.

But the one thing he admitted, if you remember, was that he was in the park, through the park at about – a little after 4 o'clock. He then testified he left, went through the park and went to his girlfriend's house.

I would suggest to you that he may have gone to his girlfriend's house, and James Henry may have taken him home, and he may have been home at 6 o'clock. But there was plenty of time, given what he told you he did that day in between, to be in that park and participate in this murder and this robbery.

And if you examine the testimony of the witnesses who testified for Mr. Harris, thinking about who they are, what they said, the things they were certain of and not certain of, you will see that there is a great deal of support for just what I suggested, that Mr.

Harris may have gone there, but has pushed back the times by 30 minutes. That's all it takes.

Now, bias is something that you can take into consideration, and obviously Mr. Harris' three witnesses that testified for him were his mother, his girlfriend, and his best friend, James Henry. Not to be cute about it, but if – using Mr. Harris' example – if Mr. Harris set a [465] house on fire, who would be the last people who would call the police and turn him in? His mother, his girlfriend and his best friend.

MS. ROBERTS: Objection.

MR. GOREN: And I'm not suggesting necessarily that they were lying about seeing him that day, but clearly wrong about the times.

Now, Ms. Brooks, Mr. Harris' mother, didn't see him during the time that this murder took place, didn't see him until sometime around 6 o'clock. Saw him earlier in the day about one or two, a time when he came home, she said. She wasn't sure he did that.

Came home and said, "I didn't get a part off that car." He said he did. Ms. Brooks testified about a day when Mr. Henry called several times. Mr. Henry said he never called; that this was a chance meeting, not an arranged meeting.

Ms. Brooks doesn't know what her son did during the late afternoon hours, 4:30 to 5 o'clock. You heard Artina Powell. Carolyn Powell's sister testified that she saw the two of them. First she said 3:30; didn't she? Then she said four to 4:30 – or, she was absolutely sure it was 4 o'clock. Then when confronted with her Grand Jury testimony, it was closer to 4:30 or five like she said at the Grand Jury.

[466] But she said she was absolutely sure. She said she had a parade that day, but when confronted with the Grand Jury testimony, she said, "Well, maybe I didn't."

Now, what was going on with her? She came down here wanting to help, but she didn't know the times. And it's the times that are most important with regard to Mr. Harris. If you believe that these events happened that day as opposed to some other, it's the times and the uncertainty about the times that are most important.

At best, what Artina Powell saw was James Henry and Alphonzo Harris, I would suggest, sitting in a car around 5 o'clock.

Carolyn Powell, Mr. Harris' girlfriend, she denied he (sic) was a girlfriend, Mr. Harris said it wasn't a girlfriend. But his mother said they were girlfriend and boyfriend. Artina Powell said they were girlfriend and boyfriend.

Carolyn Powell said she saw him every day. She stayed over at the house at least two or three times that week; didn't she? "When Monk's under the hood of a car, I'm under the hood of a car."

She admitted, before she even began her testimony, that she's got a poor memory because of this accident that she's had, and has trouble remembering some things. But she remembered that day so clearly, down to, "I remember [467] somebody asking me the time at 5:40." "Who was that?" "Well, I don't know who it was, but I remember somebody asking me the time at 5:40. That's why I remember when Mr. Harris left and I timed him home." She testified that he got there sometime after she arrived, but in the Grand Jury

she admitted she said that he was there when she got home.

Perhaps most important, she, when she talked about the time he got home, sometime around quarter to four when he got to her house, she was contradicted by Mr. Harris' own testimony; that he got to her house sometime closer to 4:20.

She wanted to help. She thought this harness, this wire harness was important; didn't she? She knew what it was. When confronted, "How did you know?" "Well, I have books at home." She told a whole story about the harness because in her mind that was very important. She was trying to help.

But the thing that she was not certain about is the time.

And James Henry, who Ms. Roberts suggested you may not want to date him but he's not a liar – well, didn't he admit that he didn't tell the truth? Isn't he contradicted by every one of those witnesses about what he was doing there that day? They all said he was there [468] every day trying to see Ida who had this order not to see. Every day. He's up on the porch. He parks the car out there. He tries to see her. Every day he drives around the block and he comes there and he looks for her. But he said, "No, I come to see Carolyn and Monk. I was just there that one day to see Ida."

One day, the day that some holes were punched in Ida Lock's radiator. He went there to see her on that one day, but he didn't see her. She came home and he didn't see her. He didn't see her car which was out there. He didn't see her daughter when she came home. He didn't see anything, because wasn't he really out there to spy on her like he had been for weeks?

Who do you think put the holes in her radiator? Also, didn't he contradict himself a number of times about when he arrived, when Monk arrived, how many times he left the car. The harness, was it left in the car, out of the car. This business with the cookies. Silly things made to be important. Why? Because everybody was trying to help Alphonzo Harris. Fill in that time.

Well, Mr. Harris himself testified – Mr. Harris, who you heard was convicted of carrying a dangerous weapon, something that you can also consider in deciding the extent to which you want to believe him – look at his demeanor, the way he testified.

[469] And think about this. Think about how what he tried to do with distancing himself from everything, from the park, from the people, from knowing all of these defendants; distance himself from the go-gos, distance himself from his girlfriend so that her testimony would be, "Oh, we're just friends. We're not close."

MS. ROBERTS: Objection, Your Honor. Again, he didn't say they were not close.

THE COURT: Again, ladies and gentlemen, it is your recollection of the evidence that controls. It is not either counsel's.

MR. GOREN: And you can consider, in viewing and deciding how much to believe Alphonzo Harris about what his interest is in that trial, and doesn't he also have a skin to save; and doesn't that affect what he might want to testify to from that witness stand?

Perhaps the most telling thing was when he answered questions about how he knows these various defendants of the distancing, pulling away, not wanting to be associated. Telling you things that wasn't he

making them up as he went? Isn't that the way it looked?

He said that he saw – he knew Bo-Bo, seen him one time or two times in the block, saw him go into a house, didn't know him very well. A little later on he's asked, "What about Mr. Catlett?" Well, he was asked about Mr. [470] Catlett first. "Saw him once, a couple times, saw him going into a house somewhere on 9th Street." "What about Mr. Overton?" "Yes, I saw him, too." "Do you know who he lived with?" "No, I didn't know who he lived with." "Did you know where he lived?" "Well, yeah, I saw him. I know where he lived. Up on 9th Street."

"Well, did you see him go into a house? Was it the same house Mr. Catlett went in?" "Yeah." "You assumed that Mr. Catlett lived there because you saw him go in, and you saw Mr. Overton go in there, but you didn't assume they lived together?"

What was he trying to do? Pull away, distance himself from these people and this event.

Mr. Smith, Hollywood, saw him one time driving down the street in a car. "Almost hit me when I was playing ball." "When was that?" Notice that he said it was back in 1984; didn't he? Mr. Smith said it was in 1984. He did that because he has to distance himself.

Couldn't know Calvin Alston. Couldn't have played football in 1984. "Did you know his name?" "No." "Well, how did you remember it was Mr. Smith?" "Well, some people were talking about him." "Well, did they know his name?" "Yeah." "Did they tell you what it was?" "Yeah." "Well, didn't you know it?" "Well, they told it to me. I wasn't sure of it." Distancing, pulling away. Not because, knowing [471] them or not knowing them

is so important. It demonstrates to you what he was trying to do on the stand, that he wasn't being honest.

"Did you ever go through the park?" "That's not my regular route. I used to go this way, this way, this way." Pulling away from the park, pulling away from the people, saying he's not sure to a number of things, because a number of answers to questions would have automatically contradicted other witnesses.

"You said you stayed there. You didn't go home like your mother said you did at one or two?" "I'm not sure." "Tell your mother about getting a part that day?" "Well, I don't recall." "Did you say you got a fusebox from Detective McGinnis?" "Yes, I told him but I also told him about the harness. Even if he didn't write it down, I told him about the harness and the fusebox. The fusebox I was going to get when the police were there. I was going to get that later."

Making things up as he went when he got caught, in not telling the truth. Distancing – even from this car and what's written on this car, his name on the car. Distancing that it was totally abandoned, had to make it a lot worse than it was. What's so important about that car? Pulling away from it. No doors, no trunk, no hood, no wheels. It is abandoned. Why exaggerate? Why even pull [472] away further? Because he wasn't being honest.

And the most important thing is the time. He left the park at around – think back on what his testimony was. Left the park, left some friends in the park at a little after –

MS. ROBERTS: Objection, Your Honor. That was not the testimony.

THE COURT: Again, ladies and gentlemen, it is your recollection of the testimony that controls. It is not Ms. Roberts' and not Mr. Goren's.

MR. GOREN: Didn't he testify that he passed through the park sometime after four, went and sat five or ten minutes, ten or fifteen minutes to get to where he ran into Mr. Henry, sat in the car for twenty minutes or so.

Well, if you think about that, that puts it at around sometime 4:30, 4:35. Then he went into Carolyn's house. Then he came out, sat in the car again with Mr. Henry. Got the cookies, went back into Carolyn's house, went out in the car and sat there for an hour before he went home.

Well, if you think about that, 4:30, 4:35, that's when he says he first saw Carolyn Powell. Ms. Fuller was murdered sometime between 4:30 and quarter to five, wasn't she, when you think about everything that happened?

[473] Melvin Montgomery said it was about thirty minutes or so after Henry moved his car – after Silky moved his car. Why do you think Silky moved his car? Because it was rush hour. It was 4 o'clock. You have to move your car from one side of the street to the other because of rush hour.

Ms. Fuller was last seen at 4:30 around her house or somewhere around there. It was about 4:30 or quarter to five when she was killed. Nobody was certain about the time, the people in Mr. Harris' window, his room.

It's only James Henry who was with him at that time, and it's he who said he didn't get to Carolyn

Powell's until sometime around the time of the murder. I would suggest to you that it was right after the murder, if it was at all that day.

Carolyn Powell lives minutes from the park at 8th and H. Here's a map of that area. The park right here, Carolyn Powell here. Five blocks, six blocks, minutes away. And it's conceivable that he could have gone to the house; that some of these events could have taken place and he still participated in the murder.

And when you combine that with the fact that nobody had any reason at all to point the finger at him unless he was there, I submit to you that he did commit this murder. That Harry Bennett and Calvin Alston both are right, both [474] are accurate, both are being truthful, and that his alibi is full of the big hole, this time element is missing. Even if you believe that that's the day that all this happened, it still doesn't preclude him from being there.

Let me just go on for a minute to Mr. Overton. Very quickly, Mr. Overton's grandmother testified, Ms. Adams. She said her memory is not as good as some of the other people. She told you that she didn't remember a lot of things about that day. And the most important thing is that she told you that she had to be made to remember; that Lottie made her remember about the fact that it was raining that day; about the fact that Lottie was even there.

A woman who followed the same routine for thirty years. She remembered the routine, and they had made her fit the routine into this day. She doesn't know anything about that day except what they told her. Even Lottie told you, testified that she had to help grandma remember; that she didn't remember everything. They had to show her the T.V. to show her it

was raining on the day of the murder, even though the day she remembered, Ms. Adams, it wasn't raining.

They had to tell her that Lottie was there that day because in the day that she remembered, Lottie wasn't there. She was all alone. Sure she was positive that this was the day of the murder, because they made her remember it. [475] They told her it was. She was sure because Lottie and Mr. Overton's mother had talked to her and now she remembers.

But it wasn't the day she remembered. It was the day that Lottie imposed on her, that Lottie created, because the day she remembered she was all alone and none of this happened.

And if you have to base it on what Lottie remembered she remembered things that nobody could possibly remember. When Russell came into the house, what did she remember? She remembered hearing him. "Did you see him?" "Well, I remember his steps. I remember seeing just this part of his legs on the steps."

Now, please, ladies and gentlemen, there's a lot of things you may remember on a given day, but seventy days later you're not going to remember that you saw this part of him on the steps when you saw him coming up the stairs.

"Remember that I gave him a cigarette and he said, 'Thank you, Lottie.'" Why did she remember that? How could she remember that? She remembered when she got a cup of coffee at 4:25. She remembered things that nobody could remember, because she created those things. She was not telling you the truth, because Russell Overton was not there that day. And he wasn't there that day not only because the alibi doesn't work, but because people saw him [476] other places.

Melvin Montgomery saw him at the park all afternoon, because Melvin Montgomery saw him afterwards in the park, after the murder, as did Bey-Bey who saw him in the alley. Ms. Adams may be remembering a day she hit him with a stick when he came in drunk, but it wasn't October 1st, and nobody, Lottie or anybody, can change that, even though she tried.

Mr. Rouse indicated that he was not there. He was not believable. Chris Taylor was not believable. All of the people who are linked up to Mr. Rouse's alibi are in this case. They all had an interest as did Mr. Rouse in distancing themselves from the park and from this event.

Anquetta Taylor, Girl-Girl, Crystal Taylor, Annette Taylor, they don't know anything about what happened in that alley because they said they weren't there. Well, you make a judgment yourself out whether to believe them, whether they were there or not there.

They certainly didn't say they saw Levy Rouse at any time during the murder, or Christopher Taylor any time during the murder. Christopher Taylor, whose voice dropped when you confronted him with what he had said in the past; who was unable to look at you; who kept his head down; who didn't recall the answer to any difficult question, any question that forced him to go beyond this [477] story that he had memorized.

"What clothes did you have on?" That was a question that was asked of him. Didn't he describe the clothes that he had on? A blue shirt with little alligators, some jeans and a cap.

He had problems the first day, confronted with all sorts of things. The second day when he came back, he

told us that well, he had smoked lovely every day during that whole period. That's why he didn't remember. He didn't say anything the first day, but the second day he discovered, "Well, I don't have to answer those questions because I don't remember anything because I was smoking lovely. Well, I remember being in the office. I remember some police officers, but I don't remember what I said. If you say I said that, I don't remember any of that."

Ms. McEwen said, "Look, he was upset, he was under a lot of pressure." You notice that whenever he was asked about those times, he reacted funny because he was under pressure.

Whenever you asked him about those times, the time in January when he told the police that he was there and saw what happened, the time in April when he said it again, the time that evening of January 16th when he said it to Detective Gossage, he looked down and looked the way he did because he was not telling you the truth.

[478] And you remember that Harry Bennett said he was there, too. Of course, then there is Mr. Rouse who told told you the same story that Chris Taylor just told you. Times the same. Where they went the same. And it's not that he told the same thing, because it's true, if it had really happened they both would remember where they went.

But he couldn't go beyond the details of the story. When you think about something, you look back in your head and you see a picture. You can answer questions about what happened because you got a picture of it in your mind. If you make it up, there is no picture to look at. You have to think quick. You have to answer

questions. You have to invent it as you go, and he couldn't do that.

Notice that neither one of them ever said they had any contact with anybody that day except for the people in this case or members of Chris Taylor's family. His sisters, Fella, Bo-Bo, each other.

Mr. Rouse, in telling what happened that day, didn't he go back and forth? Didn't he say basketball once then craps another time? Didn't he say at one point, "Well, I was – Chris went into the Chinese store for about an hour," and then two minutes later he said it was about twenty to thirty minutes? He couldn't remember what he said from one minute to the next. He changed what he said from one minute to the next as it suited him.

[479] The business about the gun, a blank pistol at first, a toy gun. Then it became a plastic gun, then a shattered plastic gun, broken. "I threw it away." "Why did you throw it away?" Some talk about the first of the month. Went on and on and on.

Seeing Bo-Bo. Didn't he testify before a break, "I saw Bo-Bo, Russell. Overton, in the park wearing a white coat"? He went back into the cell block during the break. Did they talk back there? Did something happen back there?

He came back out and said, "I don't remember who it was. All I remember is it was a white coat."

Mr. Rouse, I would submit to you, boldly came in here, and he thought that he could talk his way out of this whole thing. He changed his story from minute to minute as it suited him.

He showed you his ability, willingness and interest in telling the truth. On the 3rd of October he came

down to this courthouse, nervous, rubbing his leg nervously, and made a whole bunch of inquiries to find out if anybody knew anything yet.

Rode around the block when Vincent Gardner was talking to the police. He was very interested because he knew what he did. Ms. McEwen made it sound like, didn't she, that he was the only person in this whole community who came forward to give information about what happened? [480] Do you believe that?

Very quickly think of the story he told about leaving the house and what time he got up, making it up as he went. One final thought on Mr. Rouse. One of the things he did continually was repeated questions. He didn't know the answer. He needed time to think.

"Where did you go from there?" "Where did I go from there?" "Yeah, where did you go from there? How long did you stay out there?" "How long did I stay out there?" "Yeah, how long did you stay out there?" Continually a technique to give him time to think about the answers.

Trina Ward told you some things about Mr. Rouse. She told you that she saw blood on his pants on October 1st. She told you some of the things that he said, that he admitted to her in the hospital, that he was there. That at some point he said to her, in a threatening way, because she said something to him after he had done this crude thing in the kitchen, "I don't worst things than that. I done the worst thing to that lady in the alley." And he did: didn't he?

And the proof is not just in those statements but in the fact that witnesses – five people say that Levy Rouse did the worst thing to that lady in the alley.

I'm not going to dwell on Trina Ward. Her testimony speaks for itself. You have to make a judgment [481] about whether that's a believable person. If the reasons why she lied to the Grand Jury are explainable, then who was it she was biased for then? Levy Rouse. She protected. Levy Rouse. Not Harry Bennett, who she testified about in the Grand Jury. But Levy Rouse.

Ms. McEwen made a big deal about the fact that they are now lovers. What did she say? The day after he testified, she began seeing him again. She didn't see him from back in the beginning of the year, all the time she was pregnant, until this trial started. But for some reason, Ms. McEwen suggests they were still involved and made up this story about Levy.

If anything, she was pro Levy, bias for Levy. Now, that whole scenario about Levy, Trina and Harry Bennett is also important in thinking abo Ms. Ruffin. Let me just jump ahead for a minute and say to you that – well, Mr. Seals suggests that the way Ms. Ruffin got involved in this case is that Harry Bennett needed somebody to protect Trina Ward, because when he came in here in February, February 6th and gave his original statement, he said Trina was there. He said he said it because he was mad at Trina.

There's no way to justify that. It was a petty, stupid, immature, dangerous thing for anybody to do. And that's the kind of person he was back then. And that's the [482] kind of person maybe he is in many ways. But in April, still not having seen Trina Ward – he didn't see her between February and April. When he got arrested again, having been released, in spite of the fact that the U.S. Attorney's office, he told you, asked to have him held back then, he got arrested on a drug charge.

He didn't want to go to jail. Who would? He started saying that he would tell what happened. Asked about Trina, he said, "Trina wasn't there." Now, Mr. Seals said he needed somebody to replace Trina, because he's already committed himself to a girl being in the alley.

Why did he have to replace her at all? Why couldn't he have just said, "There were no girls there. I was mad at Trina. There were no girls there," or, "There was a girl there but I didn't know who it was," or, "There was a girl there. I knew her nickname but I didn't know her real name"? There were a number of ways that Harry Bennett could have said she wasn't there, there was nobody there, I was mad at her and I made that up.

Why did he have to put anybody in her place? He didn't. And more importantly, why did he put Lisa Ruffin in? Why did he put somebody that he knew in there, that he told you he was friendly with because she was very close to Nicole Logan who lived down the street, who Harry knew and was close with? Why Lisa Ruffin, if it wasn't true that [483] Lisa Ruffin was there?

I submit to you that there is no reason. Once again, there is no reason why Harry Bennett would say anything about Lisa Ruffin if it wasn't true. And you think about it. There is no reason you can think of, no reason that has been presented to you at all, except that she was really there. Nobody forced him.

You heard Ms. Ruffin isn't known by most of the people here. It's not like the police were out to get a group of people and Lisa Ruffin was a part of the group. Lisa Ruffin didn't have a whole lot to do with these people, individually.

Why Lisa Ruffin? Mr. Seals said Lisa wouldn't commit a crime like this on people she didn't know. Let me suggest what happened to Lisa Ruffin that day. She was in the park with some other people. There were other people there. You heard testimony about Mike Campbell, who she was with, was seen with in the park – in the alley. Some younger people, Vincent Bugbay and some others. She was sitting in the park. They decided, a number of people decided to rob Ms. Fuller. They did it loudly. People knew about it.

She heard it. The other people heard it. They all followed her into the alley while they kidnapped Ms. Fuller, dragged her down the alley. Lisa Ruffin went in and [484] followed. Not merely present. She was curious perhaps at first knowing something was going to happen, knowing perhaps what was going to happen. She knew when she saw it.

Did she leave? No. Did she help? No. Did she say anything? No. She followed down the alley while they continued to kidnap Ms. Fuller, beating her. When they got to that point where they started stripping things off of her, she was seen leaning down.

Was she with all those people? No, not in the sense that she knew them and was friendly with them, but she was there and she helped. Her relationship with them at that point was clear; wasn't it?

She followed them into the garage where she got a ring. She participated and is as guilty as each and every one of them. And the fact that she didn't know Calvin Alston or some of the other people, or they didn't know her, doesn't mean she wasn't there, doesn't mean she isn't guilty.

Now, Mr. Smith, Hollywood. Mr. Smith and Mr. Christopher Turner both have similar alibis. Call

them the upstairs alibi and the downstairs alibi. Both in the same house. Both depended on the same people.

If you think back – I could go in and talk, about all the inconsistencies and the stories. Ms. [485] VanSusteren, I believe, made the point about Dr. Bray. Think back and when Dr. Bray testified and you will come up with all sorts of answers. That's the point.

You can't remember when Dr. Bray testified, because it was not when he testified that was an important event. You can't remember the date. But all of these people did, not two weeks ago or a week ago or whatever it was, but seventy days later they all remembered. And they remembered it in some detail.

Inconsistencies about all sorts of things. The time, who came home first, what people were doing at the time they came home. Think about – and you can remember those. You heard the testimony. You remember it as well as anybody. That's not the important thing about Mr. Smith's alibi or Mr. Turner's alibi.

It is important in thinking about it to remember the way they testified, and it's not really a situation where you're damned if you do and damned if you don't, remember too many details, remember not enough. It's not the number of details that you remember that is important. It's watching people remember an event. It's making a judgment from what they tell you and how they tell you and the reasons why they remember one thing as opposed to another. Making a judgment about whether they're being honest with you and whether they're being accurate with you.

[486] Ms. Anderson, Mr. Smith's grandmother, followed the same routine every day. She described October 2nd and October 3rd to you. It's the same

thing. The only way she can say that this was the day of the murder is because Kelvin told her he got a call from Tracey Dee.

So, if you follow that all of the way up the line, what you end up with is Tracey Dee is the key to this whole thing for Kelvin Smith, because he got a call from Tracey Dee that day telling him about the murder.

And when the call came is real important, too, because it came when Denise Riddick got there, a little bit after Denise Riddick got there, the friend who got there after work. She said, "The latest I got there was 5:45," didn't she?

They already knew about it when mom got home, when Ms. Shields got home, around 6 o'clock. They knew about the murder the day of the murder before the police discovered the body, and they heard it from Tracey Dee, who heard from Christopher Taylor, who found out about it because he was down at the alley, he told you, later on at night.

It's an impossible alibi. It's like taking a chain, taking one link down here, Ms. Anderson, and another link, Kelvin Smith, and another link, Ms. Shields, and another link, Ms. Riddick, and hanging it on this nail [487] called Tracey Dee. There's nothing there and the chain falls on the floor. It's an impossible alibi.

You have to view Mr. Smith's testimony. I will ask you do you want to give the keys to your apartment to Mr. Smith, also? But it's a foolish example, and I'll talk about it a little later on, because it's not the kind of thinking that you want to go through in making a decision about who to believe in this case. We're not talking about who to give the keys to your apartment to for a week. Who do you believe and why do you believe them?

Mr. Smith, who contradicted his grandmother and contradicted some of the other witnesses about going into her room and getting the phone and all sorts of little things that tell you perhaps he's not talking about a real event or the same day; talking about going into her room and when he found himself there he was there for five minutes. "What were you doing?" "I was combing my hair." "For five minutes?" "Well, I was also putting on deodorant," making up things as he went, not remembering, distancing himself from Carrie Eleby in a way that showed you that he was making that up, too.

"It's not my baby. It couldn't be my baby. I didn't start seeing her until a couple of weeks after October 11th." "Well, that's sometime in late October." "Well, it was after Crissie's birthday, October 26th." [488] "When did you have sex with her?" "A week after Crissie's birthday." "Well, that's November 2nd." "Well, no, it couldn't be then. That's when I started seeing her." He kept changing the story. Why did he do that? The baby is not his, he claims. And the baby not being his meant he had to put off when he started having sex with Carrie Eleby, distancing himself from that, not answering questions.

"Well, when did Tracey Dee tell you about the murder?" Everybody testified it was before 6 o'clock because that's when they were told about it.

MS. VAN SUSTEREN: Objection. That wasn't the evidence.

THE COURT: Again, ladies and gentlemen, it is your recollection that controls. It's not Ms. VanSusteren's or Mr. Goren's.

MR. GOREN: "When did you get the call from Tracey Dee?" "I don't know." "Well, was it before 11

o'clock?" "I don't know." "Well, was it early in the day?" "I don't know. I don't know. I don't know."

But the testimony was clear, wasn't it, that it came before six, around six, at an impossible time, all based on Rene Walker. Rene Walker, who was firm in that she was going with Beany then; who was firm that this happened on a weekend, on a Saturday. Said so in the Grand [489] Jury. She said, "I was going with Beany. I talked to Beany on the phone." Oh, by the way, she said in the Grand Jury, "I called Hollywood." "Did you reach him?" "No, there was no answer that day." But now she says she called him. Going with Beany. "When did you first meet Beany?" she was asked in the Grand Jury. "November 16th. That's the day we first met."

So then this happened after November 16th. And maybe it did. Maybe it was an event that happened after November 16th, but it didn't happen on [illegible]ber 1st.

The same witnesses in the downstairs alibi, Ms. Shields, Latonia Smith, Mr. Kelvin Smith's sister, Denise Riddick, testified about that same phone call, about it coming in that afternoon, about Crissie being there and again talking about the inconsistencies in their testimony, about the times and where people were at.

The bottom line of that you still have to pin that on the Tracey Dee hook which isn't there. It isn't there for months. It can't be there for months. The whole alibi falls apart.

But think about Christopher Turner. Mr. Deberardini said, "Mr. Goren, Mr. Behm, they didn't hurt him on cross examination." Christopher Turner, who remembered that day very well, think of his demeanor, how cool he was on the the stand; how he couldn't even

wait for a question to be [490] asked before he started answering it; who told us all about himself; who had an answer for everything; who liked to talk; who explained everything; who argued with Mr. Behm about – when he started asking, "Were you boxing? You said you were too hurt to work. Were you boxing?" he started arguing with Mr. Behm; didn't he?

Take a look at the way in which he testified in making a decision about whether he was telling you the truth. And think of this. That when he was arrested by the police, he told the police, "I wasn't there. I was over Kelvin's house. I have three alibi witnesses. I have three people who can say I was there." He was ready the day he got arrested, Sunday, December 9th. He knew where he was seventy days before, and he was ready.

And he was ready to be cross examined. "Why didn't they ask him about the statements to Detective Villars? Why didn't they cross examine him more?" What do you think the answers would have been? Do you think all of a sudden he would have confessed on the stand? He was ready. He knew the answers. He knew what record he listened to. He knew all the details of that day.

"I got up. I went into the den. I listened to the New Edition cut. I laid down on the couch. Latonia came over 2:30 to three. I watched the stories. She fixed something to eat. I watched One Life to Live. I [491] watched the video, Donkey Kong. I watched Inspector Gadget. Ms. Anderson, Kelvin's grandmother came in. She went right into the kitchen."

He knew everything about that day. He had an answer for everything because he's been ready for this day for a year, over a year, since October 1, 1984.

Asked about Sunday, he knew about Sunday, as long as you were talking about the T.V. schedule. He watched two football games. But beyond that, he couldn't remember, because nobody could. Nobody, the day they're arrested, could say, "Oh, yeah, I was at Kelvin's house. I know exactly what I did." You couldn't do that. But he was ready.

And two of them said that they talked –

THE COURT: Which two are you speaking of?

MR. GOREN: Mr. Christopher Turner and Mr. Kelvin Smith said they talked to Vincent Gardner, who came in here and said he didn't call anybody. Christopher Turner, who denied coming up to Vincent Gardner the day after he went down to the police station to give a statement, and who Vincent Gardner said was very – "What were you doing there? What did the police want? You snitch about the death of the lady in the alley?" Why was Christopher Turner interested For the same reason that he got his alibi ready and was ready the day he got arrested. Because he was there. He [492] participated and he's guilty.

Charles Turner, Fella, no real alibi; is there? His mother comes in and his brother and says things about seeing him. He even denied that. He was all alone. He was there when Levy and Vincent Gardner – whoops, Vincent Gardner again. Vincent Gardner didn't go there that night.

Even the alibi he had is locked up to all the people in the case except for Vincent Gardner blows it wide open, because Vincent Gardner didn't see him that night.

Before I leave Christopher Turner, there was a great deal of some three witnesses who testified about his

reputation in the community for peacefulness and good order. That anybody who would have the reputation he had is not capable of doing something like this. How could she be fooled? How could people like this be fooled? People are fooled all the time. Because he was nice to an older woman at work, or a teacher, doesn't mean anything about what he did on October 1st, the day she wasn't around.

The fact that they liked him and that he was helpful, what does that say about October 1st? Don't be confused. No one here at this trial is trying to say that all or any one of these people is a bad person. That's not the issue. The issue is did they do a bad thing on October 1st? That's what you have to look at.

[493] Mr. Webb, also. The testimony from a very distinguished lady who lives next door to Mr. Webb, who has talked to the neighbors, and the people on the block think he's a nice guy. Maybe he is a nice guy on the block. Maybe he always was a nice guy on the block. But none of those people were with him on October 1st. None of those people are with him all of the time. Those are your neighbors. Those are the people you live with. People often act differently there than they do with their friends. People often fool their neighbors and their parents and other people who are, quote, important to them, close to them.

Mr. Webb says nobody named – Calvin Alston didn't mention Steven Webb's name when he first gave his statement. Mr. Webb can't have it both ways; can he? On the one hand, don't believe Calvin Alston because he's a liar. He lied when he got up here and said Steven Webb was there. But you can believe him when he gave a statement back in November because he said Steven Webb wasn't there. You can't have it both

ways. You've got to decide, was Calvin Alston being honest when he testified on the witness stand?

And if he was, then he was being honest about Steven Webb. He said he wasn't asked about Steven Webb. He never thought about Steven Webb back in November. He [494] thought about him. He wasn't trying to be accurate or complete. He was thinking about himself.

There is no reason why Mr. Webb would be named by Mr. Alston or Ms. Eleby or Mr. Bennett, no reason, unless he was there. It's another one of those cases where everybody is making everything up but nobody can tell you why. The only answer is because he was there and he did just what those three people said he did.

Finally, Mr. Yarborough, I would argue, very strongly corroborates all of the testimony about him himself. Now, think about Mr. Yarborough's statement and what he said. He said that he was there, present. He said that at some point he handled some money that was given to him to hold. He was going to take and run with it, he said.

He said he was in the park, corroborating what the witnesses said about him being the park at the time that the conversation took place. But he didn't want to have any part of his statement that he left, that he left and went to the alley and he watched the whole thing. He saw only what someone who was in that garage could have seen.

I would suggest to you that what happened with Clifton Yarborough's statement back in December of 1984 is exactly what you saw happening with Harry Bennett when he [495] gave his statement, and Calvin Alston when he save his. What did they do? They said,

"Well, I saw it but I didn't do anything. I didn't do anything." They thought of themselves. They protected themselves.

Did they make up that story? Mr. Yarborough suggests Mr. Yarborough made up the story because the police put pressure on him, the police told him what to say. Did you see the police telling him anything? Did you see the police correcting him about anything? All you saw was him talking in narrative form, not yes or no, telling what happened. And he did, didn't he, just what Calvin Alston did and just what Harry Bennett did? He denied his own involvement in any sustantial way.

He admitted some of the little things like handling the money. What did Calvin Alston say about Clifton Yarborough in the garage? That he was fighting with Snotrag over the purse; that he did have the money; that he paid him a couple of days later.

Clifton Yarborough confessed –

MR. ROBINSON: Objection.

MR. GOREN: – in his own way –

MR. ROBINSON: Objection.

THE COURT: Overruled.

MR. GOREN: – by telling the police in that videotape, doing just what Harry Bennett and Calvin Alston [496] did, by doing the normal thing, by knowing he was caught and telling everything, except not himself.

It would have been better if there had been no deals made, no bargains. It would have been easier for the Government. It would have been better if there were

no drugs involved. It would have been better if nobody ever lied about anything.

It would be better if Harry Bennett didn't have a bargain with the Government. It would be better if he wasn't running around on the street; wouldn't it? But you might think, and I submit that without him, there might be a whole bunch of people who murdered Ms. Fuller running around loose on the streets.

MR. ROBINSON: Objection to the inference, Your Honor.

THE COURT: Overruled.

MR. GOREN: There might be a whole bunch of people running around loose without having made that bargain, that agreement. He'll go to jail; won't he? A judge will make a decision about him. But it would be better if there were no drugs, there were no bargains, there were no lies. It would be nice if there was some very nicely dressed woman or gentleman driving by who saw the whole thing, that knew everybody and could identify them, or if the police happened to go by and caught everybody in the act; Levy Rouse, [497] pipe in hand. That would be much better, but nobody came forward. Maybe nobody saw it. Maybe they did, but nobody came forward. After an exhaustive and intense police investigation, the only witnesses who came forward or were brought forward who were found, you have heard from.

And who else – one of the things that you have to think about is, because there were no passersby, there were no police, there was no woman looking out the window, there was no other more respectable witness around. Who else would you expect to testify about an event like this except for the people who saw it? And who do you think were the people who saw it?

It's only the people who saw it that could come in here and tell you, and the only people who would see see something like that are people like Carrie Eleby and Linda Jacobs, Harry Bennett, Calvin Alston, Melvin Montgomery who spent his days in the park. Who else would you expect?

Carrie Eleby admitted she used PCP. She saw the murder. She kept quiet about it for a long time. She protected her boyfriend. That's the kind of person that would have witnessed something like that. That's the kind of person you would have expected to be there. It's not the kind of person you'd give the keys to your [498] apartment to, no.

But, who else do you expect to be back there? Who else but the participants and the friends? Who else could tell you except someone who was back there? The question here is not whether they are nice people or whether they are people you want to date or whether they're people who you want to give the keys to your apartment to or who you trust about calling in a fire alarm. That's not the issue.

The issue is truth, not trust. Who do you believe; not who you trust in the sense that has been described in some of those examples. If you were thinking about your apartment, you would only give them to a very close friend. You wouldn't even given them to Judge Scott. You don't know him well enough. That doesn't mean you wouldn't believe him. Or to me. You don't know me. Trust is the issue here; not truthfulness.

You wouldn't go and have to take advice if you were thinking about an operation or medical operation from anybody but a doctor; right? Not from me or from a neighbor or from anybody else. You want an expert. Somebody who knows what they're talking about.

You wouldn't buy a car from anybody but a car salesman who is somebody who knows something about cars. Well, I submit to you that important decisions have to be [499] made with the advice of people you trust in deciding about those things, people who know about them. And who else would know about a murder except for the people who participated in it, a murder like this, and their friends, and their girlfriends? Only the people who were there, only the people who would witness it and not stop it, who would witness it and keep quiet about it; who would remain loyal to the people who did it, people who use drugs, people who live out there in that park.

Judge the believability of these people by a standard that fits this situation, that fits these people. Think about who they are, what they are. That's the kind of thing that you have to make a decision about.

Now, finally, you have for the past three days listened to all of us talking about the evidence, argue it. Sometimes you might think I have expressed my own personal opinion.

You have to forget all that. If you were going to decide what happened that day, you have to forget about the last three days in some ways, because while it may be important, the final judgment, the most important thing is to take back with you not the statements of counsel. Forget me. Take back there the image of Melvin Montgomery, Calvin Alston, Harry Bennett, Carrie Eleby, Maurice Thomas and the other witnesses. Take them back there and sit [500] quietly and think about it. Think about who they are. Think about what they saw. Think about how impossible it would have been for them to have invented what they told you, how impossible it would have been for them to have created this story if it wasn't true.

Think about the way they behaved on that witness stand, because that's really the best way of deciding whether to believe them. Think about when Harry Bennett cried when he told you Ms. Fuller's last word, "Stop." Think about those tears. Think about that face. Think about those emotions.

Think about Linda Jacobs, how she broke down when she had to think about that moment. You tell me, thinking about that, that she didn't see it, that he didn't see it. Think about Calvin Alston and the way he behaved and how he got all torn up when he started, talking about that moment.

Think about Melvin Montgomery and how he didn't want to be here. It was obvious; wasn't it? But he was not swayed one bit from what – he wasn't confused. He couldn't be swayed one bit about what he saw. He had nothing to do with it. He saw it begin.

Take those images back with you into the jury room. There is no reason why any of those people would have lied about any of these people, I submit. And taking [501] those images without all of this, without us, without our arguments, just taking those images back with you into the jury room, look at them, think about them, talk about them.

It's clear, isn't it, that they were telling you about a real event; that they were here for doing one thing. Not lying. They couldn't have lied that well. They were here and they told the truth about what happened to Catherine Fuller in October of last year.

They told about what they did. They told about what each of these defendants did. They were honest. Isn't that the decision you will make after you take those images back there into the jury room?

When this case began you were told by counsel that there was no evidence to link any of these defendants to the death of Catherine Fuller on October 1, 1984. You have heard the evidence now. And I submit to you that a careful, fair review of that evidence shows you that Timothy Catlett, Snotrag, is guilty of all four counts for which he is charged; that Alphonzo Harris is guilty of all four counts for which he is charged; that Russell Overton is guilty of all four counts for which he is charged; that Levy Rouse is guilty of all four counts for which he is charged; that Felicia Ruffin is guilty of all four counts for which she is charged; that Hollywood, Kelvin [502] Smith, is guilty of all four counts for which he is charged; that Charles Turner, Fella, is guilty of all four counts for which he is charged; that Christopher Turner is guilty of all four counts for which he is charged; that Steven Webb is guilty of all four counts for which he is charged; that Clifton Yarborough is guilty of all four counts for which he is charged.

There is no reason why anybody would come in here and lie about these people. There is no reason why the Government or any of those witnesses would create the testimony and the events that you have just heard described unless it was true.

Thank you.

* * *

[613] SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
CRIMINAL DIVISION

F-8617-84

UNITED STATES OF AMERICA

vs.

TIMOTHY CATLETT,

Defendant

F-6914-84

UNITED STATES OF AMERICA

vs.

ALPHONZO L. HARRIS,

Defendant

F-8613-84

UNITED STATES OF AMERICA

vs.

RUSSELL L. OVERTON,

Defendant

F-8614-85

UNITED STATES OF AMERICA

vs.

LEVY ROUSE,

Defendant

F-5125-85

UNITED STATES OF AMERICA

vs.

FELICIA A. RUFFIN,

Defendant

F-8616-84

UNITED STATES OF AMERICA

vs.

KELVIN D. SMITH,

Defendant

F-8513-84

UNITED STATES OF AMERICA

vs.

CHARLES S. TURNER,

Defendant

Washington, D.C.
Monday, December 16, 1985

Carolyn Sargent-Burns, CP, RPR, CSR
Official Court Reporter Telephone: 879-1036

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* * *

[622] AFTERNOON SESSION

2:40 p.m.

THE COURT: Call the case.

THE DEPUTY CLERK: This is the matter of United States versus Mr. Timothy Catlett, co-defendant Mr. Alphonzo Harris, Russell Overton, Levy Rouse, Felicia A. Ruffin, Kelvin Smith, Charles S. Turner, Christopher Turner, Steven Webb and Mr. Clifton Yarborough.

THE COURT: All right.

Let the record reflect that all of the defendants and all of the defense counsel and Government counsel are present.

I have received a note which reads as follows: "We, the jury, have reached a unanimous decision on eight defendants. On two defendants we have not been able to reach a unanimous decision. We believe a unanimous decision is impossible on two defendant." Signed by the foreman.

It is my intention, just for the purpose of running this in an orderly manner, to send this note into the foreman. "Dear Mr. Foreman, please list the names of those defendants concerning whom the jury has reached a unanimous decision. Do not (underscored)

state what the verdicts are, just the names of those defendants."

Now, the reason I am going to do that is after the verdicts on the eight have been rendered, I will ask the [623] jury to go back and continue their deliberations on the other two.

MS. McEWEN: Your Honor, I would ask that the Court also add to the note that you do not wish them to tell you what their division might be as to the other two defendants when they do reply to your note.

(Pause.)

MS. McEWEN: Thank you, Your Honor.

(Pause.)

MS. McEWEN: Your Honor, will the Court give them the Winter's instruction?

THE COURT: Not at this time. I, want to admonish the members of the audience and anybody else that there will be no display of emotion when any verdict is announced.

(Pause.)

THE COURT: All right. Bring the jury in, please.

* * *

[639] THE COURT: All right.

Ladies and gentlemen, the Court at this time understands that the jury has not reached a unanimous verdict on any of the charges with respect to the defendant, Russell Overton, and the defendant, Christopher D. Turner. The Court would ask that you go back to continue your deliberations with respect to the guilt or innocence of those two defendants with respect to each of the four charges.

Thank you very much.

(Whereupon, the jurors left the courtroom.)

* * *

[644] THE DEPUTY CLERK: In the matter of United States versus Russell Overton, co-defendant Mr. Christopher Turner.

THE COURT: All right.

Let the record reflect that Mr. Deberardinis and Mr. Palmer are present, and Mr. Goren. The jury is not present.

The note is from a particular juror. The note, in addition, was signed by the foreman under the instructions that all messages come to the Court with the foreperson's name on it.

It reads: "I personally don't want to deliberate any more on Russell Overton or Christopher Turner. [645] We have taken a vote on these two defendants more than ten times with most of the people never changing their decision. Personally, I don't want to go over their case any more."

I do not intend to respond to that since it was not a note from the foreman indicating any inability, unless –

MR. DEBERARDINIS: Excuse me, Your Honor. On behalf of Christopher Turner, I would move for a mistrial.

THE COURT: What about you, Mr. Palmer?

MR. PALMER: I wanted to hear what Your Honor had to say before I respond.

THE COURT: All right.

I was simply going to let them sit in there and send them on back. If both sides agree that they want me to give the Winter's charge at this time, I will be glad to do so.

MR. GOREN: I am not requesting one at this time.

MR. DEBERARDINIS: I would simply renew my motion, Your Honor. I think the note is clear.

THE COURT: It just says he doesn't want to.

MR. DEBERARDINIS: Yes, Your Honor. I think telling them to deliberate further is by its very nature concerning his note, coercive. Considering how far they've gone and that it's the Christmas season, I think he will feel coerced.

[646] THE COURT: I don't feel he will feel coerced to change his vote. I think – I think he's unhappy with having to sit.

All right. We will wait until our usual time, then send the jury back to the place where they are being lodged.

MR. PALMER: I will not ask for a mistrial at this time, Your Honor. I think they can deliberate some more.

THE DEPUTY MARSHAL: Any reply at all?

THE COURT: No reply.

MR. GOREN: Thank you.

THE COURT: I beg your pardon?

THE DEPUTY MARSHAL: You said the regular time. Are we talking 4:45 or 4:30?

THE COURT: 4:30 I want them all to be back here in their regular seats.

(Whereupon, a recess was taken.)

THE COURT: Do you want your defendants?

MR. DEBERARDINIS: We will waive.

MR. PALMER: We will waive.

THE COURT: Tell the marshal to bring in the jury in, please.

(Whereupon, the jurors entered the courtroom.)

THE COURT: All right. Let the record reflect [647] that the ladies and gentlemen of the jury are present. Counsel for Russell Overton and counsel for Christopher Turner are present. The Government attorney is present.

Ladies and gentlemen, it is now 4:35. I am going to recess for the day. You will again go with the marshal and do not talk about the case with anybody else on the jury this evening. Don't even think about the case. Just go back and I will see you down here tomorrow morning at 9 o'clock.

All right. Thank you.

THE FOREMAN: Your Honor, did you receive the letter that was sent in to you, the message?

THE COURT: I did.

THE FOREMAN: Would you kindly give me some instruction as to what our procedure is to be now?

THE COURT: Your procedure is that all twelve of you will continue to deliberate.

THE JURORS: Thank you.

THE COURT: That is your duty. It is the duty of all twelve of you to deliberate on this matter.

(Whereupon, the jurors left the courtroom.)

* * *

[244] SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
CRIMINAL DIVISION

Criminal Action Numbers

1984 FEL 8612
1984 FEL 8616
1984 FEL 8614
1984 FEL 8615
1984 FEL 8617
1984 FEL 8513
1984 FEL 8613

UNITED STATES OF AMERICA

versus

CHRISTOPHER TURNER
KEVIN SMITH
LEVI ROUSE
CLIFTON YARBOROUGH
TIMOTHY CATLETT
CHARLES TURNER
RUSSELL OVERTON

Codefendants.

Washington, D.C.
Tuesday, April 24th, 2012

The above-entitled action came on for a jury trial before the Honorable FREDERICK WEISBERG, Associate Judge, and a jury empaneled and sworn in courtroom 202, commencing at 9:30

THIS TRANSCRIPT REPRESENTS THE PRODUCT OF AN OFFICIAL REPORTER, ENGAGED BY THE COURT, WHO HAS PERSONALLY CERTIFIED THAT IT REPRESENTS HER ORIGINAL NOTES AND RECORDS OF TESTIMONY AND PROCEEDINGS OF THE CASE AS RECORDED.

APPEARANCES:

On behalf of the Government:

James Sweeney, Esquire
Kaci Weston, Esquire
Colleen Kennedy, Esquire
Assistant United States Attorney

APPEARANCES CONTINUED ON NEXT PAGE

[245] APPEARANCES CONTINUED

On behalf of Defendant Turner:

Barry Pollack, Esquire
Washington, D.C.

On behalf of Defendant Smith:

Donald Salzman, Esquire
Washington, D.C.

On behalf of Defendant Rouse:

Veronice Holt, Esquire
Washington, D.C.

On behalf of Defendant Yarborough:

Rob Cary, Esquire
John Williams, Esquire
Cadence Mertz, Esquire
Jennifer Sasso, Esquire

Washington, D.C.

On behalf of Defendant Catlett:

Lauckland Nicholas, Esquire
Washington, D.C.

On behalf of Defendant Overton:

Michal Antalics, Esquire
Washington, D.C.

On behalf of Defendant Turner:

Jenifier Wicks, Esquire
Public Defender Service
Washington, D.C.

* * *

[433] MELVIN MONTGOMERY,

having been called as witness for and on behalf of the Defendant, and, having been first duly sworn by the Deputy Clerk, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SALZMAN:

[434] Q. Can you state your full name, please?

A. Melvin Montgomery.

Q. Mr. Montgomery, how old are you?

A. 45.

Q. And you are currently in custody; is that correct?

A. Yes, sir.

Q. And what – what sentence are you serving right now?

A. Distribution of heroin.

Q. And do you recall what the day of the conviction was, the date of the conviction?

A. 2005.

Q. Okay. And what sentence did you receive?

A. Ninety-eight months.

Q. And do you know when you're expected to be released on that sentence?

A. November.

Q. November of 2012?

A. Yeah.

* * *

[481] CROSS EXAMINATION

BY MR. SWEENEY:

Q. Mr. Montgomery, my name is James Sweeney and I'm representing the United States. Have you and I ever met?

A. No.

Q. Was your testimony in the grand jury that you saw here earlier, was that truthful?

[482] A. Yes, sir.

Q. Was your testimony at the trial truthful?

A. Yes, sir.

MR. SWEENEY: Thank you.

THE COURT: Anything further?

* * *

[485] THE COURT: Anything further?

I just have one question.

As you sit here today in 2012, many years later, how certain are you that you saw Clifton Yarborough that afternoon in the park?

THE WITNESS: I'm certain I seen Clifton Yarborough. He wasn't in the park. He was on the side of H street coming toward government Street because it was a fight. And I was trying to tell him to go ahead on because somebody was going to call the police. It had to be [486] after – I know it was after 3:00.

THE COURT: Okay. Any questions in light of mine?

MR. CARY: No, Your Honor.

* * *

[1371] SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

Criminal Action Numbers

1984 FEL 8612
1984 FEL 8616
1984 FEL 8614
1984 FEL 8615
1984 FEL 8617
1984 FEL 8513
1984 FEL 8613

UNITED STATES OF AMERICA

versus

CHRISTOPHER TURNER
KEVIN SMITH
LEVI ROUSE
CLIFTON YARBOROUGH
TIMOTHY CATLETT
CHARLES TURNER
RUSSELL OVERTON

Codefendants.

Washington, D.C.
Wednesday, May 2, 2012

The above-entitled action came on for a motion before the Honorable FREDERICK WEISBERG, Associate Judge, in courtroom number 202.

THIS TRANSCRIPT REPRESENTS THE PRODUCE OF AN OFFICIAL REPORTER, ENGAGED

BY THE COURT, WHO HAS PERSONALLY CERTIFIED THAT IT REPRESENTS TESTIMONY AND PROCEEDINGS OF THE CASE AS RECORDED.

APPEARANCES:

On behalf of the Government:

JAMES SWEENEY, ESQUIRE, Esquire
KACIE WESTON, Esquire
COLLEEN KENNEDY, Esquire
Assistant United States Attorney

APPEARANCES CONTINUED ON NEXT PAGE

Barbara DeVico
Official Court Reporter (202) 879-1484

[1372] On behalf of Defendant Turner:

BARRY POLLACK, ESQ.
Washington, D.C.

On behalf of Defendant Smith:

DONALD SALZMAN, Esquire
Washington, D.C.

On behalf of Defendant Rouse:

VERONICE HOLT, Esquire
Washington, D.C.

On behalf of Defendant Yarborough:

ROB CARY, Esquire
JOHN WILLIAMS, Esquire
CADENCE MERTZ, Esquire
JENNIFER SASSO, Esquire
Washington, D.C.

On behalf of Defendant Catlett:

LAUCKLAND NICHOLAS, Esquire
Washington, D.C.

On behalf of Defendant Overton:

MICHAL ANTALICS, Esquire
Washington, D.C.

On behalf of Defendant Turner:

JENIFER WICKS, Esquire
Public Defender Service
Washington, D.C.

[TESTIMONY OF JERRY GOREN]

* * *

[1573] THE COURT: Before you turn to Bennett – and again, I'm not sure my command of the facts is sufficient – but was there a problem that you became aware of in trying to track down Carrie Eleby's version of what happened in the car with a witness named Kay Porter?

THE WITNESS: Yes.

THE COURT: What did you know about that?

THE WITNESS: What I knew? Well, when I first got the case, I knew nothing about it. Kay Porter came down with Carrie Eleby – again, according to the files – came down with Carrie Eleby to homicide.

The police, apparently Detective Gossage, McGinnis, Sanchez Serrano began interviewing the two of them together. And Kay Eleby, again, according to the report, agreed with –

BY MS. WESTON:

Q. If I can stop you, I think you said "Kay Eleby."

A. I mean Kay Porter, I'm sorry, agreed with Carrie Eleby's version of the statement.

[1574] As I remember it, the Detective Sanchez Serrano took her out of the room as this began, but she continued to confirm that. So I only know that from reading through the report.

But we did – as I said, I talked to Ms. Eleby and Ms. Porter after that, and Ms. Porter came back sometime in December and told us that she had not told the truth about hearing the statement in the car but that she had heard several other statements made by Mr. Catlett. And –

Q. I was going to get to this later.

A. Does that answer your question?

THE COURT: It did answer my question. In telling you that she was not really in the car and didn't really hear Calvin Alston make admissions in the car, did she tell you that Carrie Eleby had asked her to say that she was there?

Do you remember that?

THE WITNESS: I don't remember what she said to me. There's something in the – in the file that suggests that, yes.

THE COURT: You don't have a recollection?

THE WITNESS: I don't remember what she said specifically.

THE COURT: So you don't remember confronting

[1575] Carrie Eleby about that. Did you ever tell Kay Porter about that?

THE WITNESS: I don't remember. I know we did, and the records seem to say that Carrie said that Ms. Porter was not in the car, and she named a number of other people who were.

I don't remember when we first talked to – when the police first talked to Ms. Eleby whether they got the names of other people who were in the car. But I know I did. And that was when I proceeded to try to corroborate that by talking to every single one of them.

BY MS. WESTON:

Q. Let's fill out the rest of the Kay Porter issue.

Did you disclose to the defense the fact that Kay Porter had initially lied about being in the car and that Carrie Eleby had told her to say she was in the car?

A. No, I did not.

Q. Do you know why you didn't?

A. I don't have a memory of making a decision not to.

MR. FEDER: I'm going to object. Why he didn't is irrelevant. His state of mind, his intent, his good faith, his bad faith is irrelevant to the legal issue. The question is was it turned over, and then what the other evidence was.

[1576] THE COURT: Overruled.

THE WITNESS: I don't have a memory of making a decision not to do it. Ms. Porter came in in November to talk to the police and in December to talk to me. She didn't go into the grand jury until sometime in August, I think August 23rd, some nine months later.

And I suspect that – and she was testifying in the grand jury about statements made by Mr. Catlett, not statements made by Mr. Alston – and I think what I did was I disassociated these two events in my mind and just didn't think of them as being part of the same thing and failed to put it into the grand jury that at

some point before this, she had come down and not told us the truth, which is what I would normally do.

BY MS. WESTON:

Q. Unless the Court has further questions, I'm going to go back to Mr. Bennett now.

THE COURT: No.

* * *

[1622] SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
CRIMINAL DIVISION

Criminal Action Numbers

1984 FEL 8612
1984 FEL 8616
1984 FEL 8614
1984 FEL 8615
1984 FEL 8617
1984 FEL 8513
1984 FEL 8613

UNITED STATES OF AMERICA

versus

CHRISTOPHER TURNER
KEVIN SMITH
LEVI ROUSE
CLIFTON YARBOROUGH
TIMOTHY CATLETT
CHARLES TURNER
RUSSELL OVERTON

Defendants.

Washington, D.C.
Thursday, May 3, 2012

The above-entitled action came on for a post-conviction hearing, before the Honorable FREDERICK H. WEISBERG, Associate Judge, in courtroom number 202, commencing at approximately 9:30 a.m.

THIS TRANSCRIPT REPRESENTS THE PRODUCT OF AN OFFICIAL REPORTER, ENGAGED BY THE COURT, WHO HAS PERSONALLY CERTIFIED THAT IT REPRESENTS TESTIMONY AND PROCEEDINGS OF THE CASE AS RECORDED.

APPEARANCES:

On behalf of the Government:

KACIE WESTON, Esquire
JAMES SWEENEY, Esquire
Assistant United States Attorneys

[1623] APPEARANCES CONTINUED:

On behalf of the Defendants:

JENIFER WICKS, Esquire (Charles Turner)
ROBERT M. CARY, Esquire (Yarborough)
DONALD SALZMAN, Esquire (Smith)
VERONICE HOLT, Esquire (Rouse)
LAUCKLAND NICHOLAS, Esquire (Catlett)
BARRY J. POLLACK, Esquire (Turner)
MICHAEL ANTALICS, Esquire (Overton)
Washington, D.C.

Katy M. Zamora, RMR, CRR
Certified Realtime Reporter (202) 879-1047

* * *

[TESTIMONY OF JERRY GOREN]

[1637] Q. Now, during your interview of hundreds of witnesses in this case, at any point during those interviews did you learn information that indicated that [1638] one individual may have committed Mrs. Fuller's homicide as opposed to a group of individuals?

A. No. Well, there was one and that is Ammie Davis at some point, yes.

Q. And I want to turn to Ammie Davis.

A. Okay.

Q. Just initially, what memory do you have of Ammie Davis as a person, if any?

A. As a person?

Q. What – do you have a physical picture of her in your mind?

A. I don't have – I do have a physical picture of her. I remember her, I think I remember her in my office stand – pacing back and forth in my office.

Q. When did you first learn about Ammie Davis?

A. Sometime in August of 1985, early August.

Q. And how was it that you initially learned about Ms. Davis?

A. One of the detectives, I think it was Pat McGuinness, came into my office with a police report that he said he'd just received from a Lieutenant Platt (ph), and I remember Pat coming in and, with the report. I only know it's Lieutenant Platt because I recently read that in – or since then read that in one of the documents that I produced.

[1639] MS. WESTON: And if we could see JX021-004.

BY MS. WESTON:

Q. Directing your attention to the bottom, second-to-last – yes, second and third to last entries on that page, do you see whose name is indicated – I'm sorry, there's actually three – whose name is indicated in those entries?

A. Yes.

Q. Who is that?

A. Ammie Louise Davis.

Q. And directing your attention over to the far right side of that page, do you see a note regarding Lieutenant Platt?

A. Yes.

Q. What is that?

A. It says "lost in the shuffle by homicide Lieutenant Platt's desk, later shot by James Blue."

Q. What is that document?

A. When I left the U.S. Attorney's Office in 1986 and returned to California, I had intended to write, not necessarily about the case but to write as a result of having experienced – the experiences I had in this case. And one of the things I did, I vaguely remember this, but I know I produced this document by going through some of my interview files and trying to chronically – [1640] chronologically list them, alphabetically list them as a way of beginning the writing process.

So this was – this chart, I believe, was made after I had left the office in the context of that.

Q. And other than having read it in this document, do you personally have a memory of Lieutenant Platt or his connection with this statement?

A. I don't have a memory of Lieutenant Platt by name, but I do know that when this – when the police report was brought to me by Pat McGuinness, that he had just been handed that by someone. I didn't the name – I didn't recall the name until now. And that it had been lost on his desk.

Q. What did you do upon – well, first of all, what was it that was brought to you?

A. It was a, I think a three-page handwritten police report by Lieutenant Loney, memorializing his conversation that he had with Ammie Davis in October of 1984.

MS. WESTON: And if we could switch to JX020, please.

THE COURT: What was that exhibit, please?

MS. WESTON: The last one?

THE COURT: Yeah.

MS. WESTON: The last one was JX021-004. And [1641] this one is JX020.

BY MS. WESTON:

Q. Is this the statement of Frank Loney, Lieutenant Frank Loney that was brought to you by Pat McGuinness?

A. Yes.

Q. Did you review that statement when it was brought to you?

A. Again, I have no specific memory of it, but I know I did, yes.

Q. And what did you do after reading that statement?

A. At some point we, again, I don't remember specifically doing it but I know I directed the officers in the case to locate Ammie Davis and bring her to my office so that I could interview her myself.

Q. And going back to JX021-004, do you remember the dates that Ammie Davis came into your office?

A. I think it was August 8 and 9. And I only know that from this document.

Q. And so you met with Ms. Davis on two occasions; is that correct, according to the record?

A. According to this, yes. I have no reason to doubt that that's not true. I don't remember specifically two meetings, but I do remember her in my office and I did write that, so I'm sure that's accurate.

[1642] Q. Do you remember any specifics of the conversation you had with Ms. Davis?

A. I don't.

Q. Do you have a recollection of what the substance of the meeting was about?

A. Yes.

Q. And what was that?

A. Well, I wanted to know what it is she said she saw and heard.

Q. And how were those questions presented to her, if you remember?

A. I don't remember.

Q. Did you confront her with Lieutenant Loney's statement?

A. I don't remember. I'm sure I did.

Q. Did you ask her for additional details beyond what was in Lieutenant Loney's statement?

A. I'm sure I did. The one memory I have is that there were no further details. She couldn't go beyond what she said in her statement. She couldn't tell me any other details. She couldn't provide me with any information about who the girlfriend that she said she

was with when this happened that would allow me to identify her.

The only thing that she did say, and I don't [1643] remember this, but I know it because of some other documents that I saw, apparently we came away from that meeting knowing that her girlfriend's nickname was "Shorty."

Q. Did you make any efforts to locate Shorty?

A. I know that we did because there is a witness summary of a woman who was not the Shorty that she mentioned but there's a description in there that we were looking for Shorty and we interviewed her because we thought she might be the Shorty that Ms. Davis had mentioned. I think her name was Lorraine Donaldson.

Q. And do you have any recollection of whether Ms. Donaldson knew anything about the murder of Ms. Fuller?

A. I don't have a recollection, but my, the summary indicates she did not.

Q. Did Ms. Donaldson have any knowledge of who Ammie Davis was?

A. I don't believe so.

Q. Did there come a time when you spoke with Lieutenant Loney about the statement that he took from Ms. Davis?

A. I know I did. Again, I have a picture of Lieutenant Loney standing in the doorway of my office, but I don't remember the conversation.

[1644] Q. What, if anything, do you recall about that meeting?

A. You know, the only thing that I remember is that there was a great deal of tension or a certain amount of tension. Again, I don't recall specifically. I wasn't very happy that no one had paid attention to the report, I think. But I don't really remember the details of it. I just remember that he was not a happy camper at the time.

Q. Did you ever make any efforts to contact James Blue?

A. I have no memory of trying to do that. And there is nothing in the record that indicates I did, but I am certain that I tried to, because I would have.

Q. Now, Mr. Goren, did you turn over the statement of Lieutenant Loney to the defense at the time of trial?

A. No.

Q. Or anytime prior to trial?

A. No.

Q. Was that a deliberate decision?

A. Yes.

MR. NICHOLAS: Objection. Leading. That was a leading question. Objection.

MS. WESTON: The question was, was that a deliberate decision?

THE COURT: Overruled. Yeah, and he answered [1645] but I didn't hear the answer. Yes or no?

THE WITNESS: Yes, it was deliberate.

BY MS. WESTON:

Q. Now, why was it that you made that decision?

MR. POLLACK: And I'm going to object again. Legally, the only thing that's relevant is whether or not he turned it over. His motive for doing so, his good faith, his bad faith, his intent is legally irrelevant.

THE COURT: I'm certainly going to overrule the objection. I'm trying to figure out whether I should characterize it, but it seems to me it is obviously true that if something is, in fact, exculpatory or Brady material in the sense that it's both exculpatory and material, the motive of the prosecutor in not disclosing it is not dispositive. That I understand, but certainly in making a record of what happened in the case, what the prosecutor did and why he did it is an important piece of information.

MR. POLLACK: Well, Your Honor, I would go beyond not dispositive, I would say not relevant.

THE COURT: I heard that. Overruled.

MR. POLLACK: Thank you, Your Honor.

BY MS. WESTON:

Q. What were the reasons that you decided not to disclose Ms. Davis' statement to the defense?

[1646] A. I believed completely and strongly that Ms. Davis had no evidence in this case. And that she was totally incredible.

Q. What were the bases for your decision that she was incredible?

A. Well, there were a number of things. First, she had told two versions to Lieutenant Loney, one that she had seen the murder; and the other that she had just seen him drag Ms. Fuller into the alley. She was unable to provide any other details about what happened, about where it happened.

She was unable to provide us with any information that we could follow up on, including the identification of the person she said that she was with. We were – we followed up as best we could with what we had. We could not find the Shorty. We could not find any other evidence that Mr. Blue was involved in this murder in any way.

And all of this, at the time, in August of 1985, was measured against the fact that I had five codefendants who had made statements that were videotaped about this murder, all of them independent of one another. A fifth, Steve Webb, who had also told two of the officers that, a similar story, which he later retracted. I had five eyewitnesses to the murder, two of those who gave video [1647] statements, Mr. Alston and Mr. Bennett, in addition Ms. Eleby and Ms. Jacobs. Mr. Thomas.

Plus Melvin Montgomery who saw how this gan in the park. I had a number of other witnesses who corroborated statements and admissions of various, of the defendants and corroborated them – they didn't all testify, but corroborated things at trial. I had a scene that matched the description made by these witnesses. I had an autopsy that matched the description of these witnesses.

I also had made a judgment based on talking to Ms. Davis. She was not serious about this. She was very playful and didn't take it seriously. And I found out that she had accused Mr. Blue of a murder nine months before the death of Ms. Fuller, in January of 1984 Mr. Blue was arrested for that. And I found out that he was later released because it was determined that she had made that up.

So this was at least the second time she had tried to claim that he had committed a murder. All of those

things combined led me to believe that there was nothing, there was no truth to this and that she was not a witness in this case. I don't have any memory of discussing this decision with my supervisors, but it is what I would have done and I have no reason to believe [1648] that I didn't do that at the time.

Q. Now, did you at some point learn that Ms. Davis was, in fact, killed by James Blue?

A. I did.

Q. Do you know how you learned that information?

A. One of the officers – well, it was in the paper, for one. But I do remember one of the officers, Detective Sanchez-Serrano actually took her dying declaration at the hospital when she said James Blue killed me, and she died.

Q. Did you have an opportunity to review the homicide file involving the murder of Ms. Davis?

A. Yes.

Q. And during your review of that file, did you see any indications that Ms. Davis was killed because she was a witness or a potential witness against James Blue?

A. No.

Q. Do you have any recollection of the situation in which the murder of Ms. Davis happened?

A. Yes.

Q. What was that?

A. I don't remember this – I don't remember it all from memory, but I do know from having reviewed the file that they were together. There was some argument about drug money – about money for drugs. There

was – there [1649] were a number of witnesses who heard that argument, nobody in that case said anything about any other conversation that they had. Mr. Blue had a gun and shot her in the head.

He later, I think, pled guilty and claimed – don't know, I'm not sure if he pled guilty or pleaded, but he claimed that it was an accident.

Q. Did you ever put Ms. Davis in protective custody or put her in a hotel or anything because of concern for her safety in this case?

A. No.

Q. Do you know whether any detectives or other police officers in Ms. Fuller's case put Ms. Davis into protective custody?

A. Not Ms. Fuller's case, no.

Q. Did there come a time where you learned that Ms. Davis had been put into protective custody previously?

A. Yes.

Q. How did you learn that?

A. At the May 9th, 10th, witness conference that I had in your office with Mr. Sweeney and a number of the other officers. One of them, I don't remember who, said that there had been an arrangement made to put Ms. Davis into a motel room in the *Heider* case, in the January 1984 case for one night. And that she stayed that one night at [1650] the hotel.

Q. And –

A. Motel.

Q. When you say the Heider case, is that the case that you referred to in which Ms. Davis also accused Mr. Blue of committing the murder?

A. Yes.

Q. Do you recall receiving a discovery letter from Michele Roberts and Corinne Schultz on August, I believe it was 7 – or August 9.

MS. WESTON: If we could see JX026, please.

BY MS. WESTON:

Q. First of all, do you recall receiving a discovery letter from Ms. Roberts and Ms. Schultz?

A. I know I did receive it and I've seen it.

Q. And directing your attention to JX026, does this appear to be the August 9, 1985 discover letter from Ms. Schultz and Ms. Roberts?

A. Yes.

Q. And do you recall receiving that letter at the time or around the time that you were meeting with Ms. Davis?

A. I don't recall, but those are the dates that I did meet with Ms. Davis, and yes.

Q. And despite receiving that letter, you still [1651] chose not to disclose Ms. Davis' statement, correct?

A. Yes.

Q. Did you respond to this discovery letter to your knowledge?

A. I did. There were two discovery letters. There was one, I think, that came a day before, but this is a

supplement to that, and I did respond, I think, on August 20.

MS. WESTON: If we could have JX027, please.

BY MS. WESTON:

Q. And you'll note that this is dated August 20, 1985, and if we could go to the last page, to the signature block. Does this appear to be your signature on this document?

A. It does.

Q. And does this appear to be the response to Ms. Schultz and Ms. Roberts' discovery letters?

A. Yes.

Q. And do you recall whether or not you included in this letter any indication that you were not going to turn over certain materials?

A. I believe I did say I was not going to turn over certain materials.

Q. Okay. And if we could go back to, I believe, the first page. As an initial matter, was this your [1652] standard practice as a way to respond to discovery requests from counsel?

A. Yes.

Q. And included in this, if you could just scan through it and let us know if you need to change pages to see where you believe you were referring to, notifying them that there was certain information you were not going to disclose?

A. I'm sorry, you want me to look for what?

Q. If you could just look through it and then if you need us to change the page.

A. Do you want me to note where I said I'm not?

Q. Yes.

A. Well, the very first paragraph I say, of course some of what you're requesting is beyond what I believe – or the Brady doctrine.

THE COURT: Slowly, please.

THE WITNESS: Sorry, Your Honor.

THE COURT: Do you want to repeat that slowly, please.

THE WITNESS: Of course some of what you're requesting is beyond what I believe I'm obligated to do under either Rule 16 or the Brady doctrine.

BY MS. WESTON:

Q. Now, if we could go – if we could scroll [1653] through to, I believe it's page – next page. Next page, please. Directing your attention to the top paragraph here, what is it that you're referring to there?

A. I'm providing, as I was required to do, the names of witnesses who were potentially alibi witnesses for, in this case Mr. Harris. And I believe I did that for all of the defendants.

* * *

[1656] Q. Are you aware of a gentleman by the name of James McMillan?

A. Yes.

[1657] Q. Do you have any recollection of when James McMillan became part of the investigation of this case?

A. I don't know exactly when. In late November, early December, when I first got the case, there were

references to having seen two people running through the alley at the time that the police arrived. At some point we identified who those two people were, James McMillan and Gerald Merkerson. I don't remember exactly when I became aware of their names.

Q. Was Mr. McMillan part of the photo book that was shown to witnesses?

A. Yes.

MS. WESTON: If we could have JX133, please.

BY MS. WESTON:

Q. If you could just scan that document and tell us when you see James McMillan's name?

A. It's No. 11.

Q. Is there any rationale or significance to the order in which the individuals are named on this list?

A. This list is the way in which these photographs appeared in a red book that we put the photographs in. Initially, there was no book and they were shown loosely. But, again, in some order, I believe. I don't remember when the book began to be used, but generally the order is chronological by when we identified somebody who we [1658] thought the picture should be in the book.

Q. Now, was there another – I think we talked yesterday about the fact that there's other versions of this list, correct?

A. There are others, yes.

Q. And are there any versions of this list that give you a sense of timing as to when Mr. McMillan, at the latest, was part of the case?

A. Well, there's one of them that has a date on it, I think it's January 14 at the top.

MS. WESTON: And if we could page down. Joint Exhibit 133-010.

BY MS. WESTON:

Q. Is this the document that you referred to as being dated?

A. Yes.

Q. And is that date January 14, 1985?

A. Yes.

Q. And what is the significance of this list?

A. Well, this was a list that was being – that documents, the photos that were being shown to witnesses at that time.

Q. And is Mr. McMillan on that list?

A. No. 11. And Mr. Murchison, too, I believe, No. 16.

[1659] Q. Did you make efforts –

THE COURT: So the significance to you is that at least you had his name by January 14, that's all you can say from that?

THE WITNESS: From this, I believe that there is a record in one of the detective's notebooks that he was in a list of – he was in photographs that were being shown to somebody as of, earlier in January, January 2nd or 3rd or 4th, some date like that.

BY MS. WESTON:

Q. Did you make efforts to speak to Mr. McMillan?

A. I did.

Q. Did you consider him a suspect in the homicide of Ms. Fuller?

A. I considered him as a potential witness or suspect, yes.

Q. Why was that?

A. I suspected everybody, I think, in some ways. Initially, well, again, going back to the way in which I proceeded in investigating this case, I tried to talk to anybody and everybody who might have any information about the case. Mr. McMillan, Mr. Merkerson were identified as – in two ways, one, running through the alley after the, after the murder had taken place; and going back yesterday to when I described going to the jail to [1660] interview Mr. Alston, the reason I went there was someone had – one of the detectives, Tom Johnson, had indicated he wondered whether, instead of Darryl Murchison it was Gerald Merkerson who was involved in this murder and that was the rationale for me going back to Mr. Alston to see if I could verify his identification of Darryl Murchison.

So Merkerson's name was a name that I was aware of. I was informed, I believe, that he ran with these guys, whatever that might have meant. So I was interested in talking to him.

Q. Do you have any recollection of actually speaking to him?

A. I have no recollection of speaking to Mr. McMillan. There are two notations in the witness summaries that I put together. One specifically about Mr. McMillan in which I believe I indicated that he wouldn't talk to us, his lawyer said he wouldn't talk to us. Another – and there is no other reference in the

record that clearly shows I did talk to him, but in a note that I wrote to one of the police officers and what I referred to as a master list, a list of things I asked the police to do sometime in June when I was on vacation, there is a note asking one or two of the officers something about Gerald Merkerson being brought back to see whether he says anything relative to what McMillan told [1661] us. It's an indication that I at some point talked to Mr. McMillan, but I have no memory beyond that.

Q. Do you have any memory of talking to Mr. Merkerson?

A. No. Although, again, the record seems to indicate that I did.

Q. Now, did you have any witnesses that you'd spoke to as part of your investigation that specifically said Mr. McMillan was not present?

A. Mr. Bennett in his videotaped statement, I believe, said, I know Mr. McMillan and he was not there.

Q. Did you have other witnesses who said, in fact, that Mr. McMillan was present?

A. The only person who said Mr. McMillan was present was James Campbell in his videotaped statement. He said Mr. McMillan was there and participated in the beating, not alone but with the others.

Q. During your investigation, did you also learn information about the circumstances of Mr. McMillan and Mr. Merkerson's presence in the alley or describing their time in the alley?

A. There were a number of witnesses who described two people running through the alley, yes.

Q. And who were those individuals?

A. Mr. Freeman who was the vendor who found [1662] Ms. Fuller's body in the garage. A woman by the name of Jackie Tylie who was a passerby who lived near there who came into the alley with some other people at about the time the police arrived. A young woman – well, it's not young anymore, Charnita Speed who was with the vendor, I believe, and knew Mr. McMillan and Mr. Merkerson.

There were three other witnesses, Mr. Eddie Davis, who was with Mr. Juan Wigfall and a young – a man by the name of Clayton Coleman, all of whom had come into the alley having heard that a body was found there. And all of them, now, Mr. Wigfall said he didn't see anybody, I think, running, but the others did make statements or testify at trial about two people, Mr. McMillan and Mr. Merkerson, present in th iley at about the time the police arrived.

Q. And do you know what time the police arrived on the scene?

A. According to the radio run, it was 6:16 in the evening.

Q. You mentioned Clayton Coleman. Do you recall whether Mr. Coleman testified in the grand jury about what he saw in the alley?

A. He did.

MS. WESTON: If I could get JX176-007.

BY MS. WESTON:

[1663] Q. Looking at line 4, beginning line 4:

"Question: So when you entered the alley, who did you see there beside" –

MS. WICKS: Your Honor, I would object. The same objection as yesterday.

MS. WESTON: This is a joint exhibit, Your Honor.

THE COURT: It's actually admitted as a joint exhibit.

MS. WICKS: Okay, I apologize. I wasn't sure if it was – okay. I understand.

BY MS. WESTON:

Q. For the record, this is Joint Exhibit 176, page 7. Beginning again at line 4:

"So when you entered the alley, did you see there – who did you see there besides the police? "Answer: Seen Russell's sister.

"Question: What is her name?

"Answer: Jackie. I think that's her name. That's her name, Jackie? I'm not too sure about her name.

"Question: But you're sure it was Russell's sister?

"Answer: Yeah.

"Question: And you think her name is Jackie?

"Answer: Yeah, because she got all these kind [1664] of nicknames anyway, so I'm not sure what's her name.

"Question: Did you see anybody else there?

"Answer: Yes, and this man who be on the street selling some drugs.

"Question: Did you see anyone else?

"Answer: Just before, I mean, when we got in the alley these two boys, they ran past us and they was

coming from 9th and H direction, coming from that direction.

"Question: Where did they run?

"Answer: They run towards I and 8th Street.

"Question: So they didn't run toward the end of the alley where the police were coming from?

"Answer: No.

"Question: They ran out toward I Street?

"Answer: Yeah.

"Question: So that means they ran around in front of the garage?

"Answer: Yeah.

"Question: Did you see them stop to talk to anybody?

"Answer: Well, they said a couple of words to Russell's sister and then they ran off.

"Question: Did you see whether they were carrying anything?

[1665] "Answer: No.

"Question: Did you get a good look at them?

"Answer: Yes.

"Question: Did you know them?

"Answer: I know them by face, one by face.

"Question: What do you know about him?

"Answer: I see him all the time. He be hanging around on 8th and H corner.

"Question: You don't know his name?

"Answer: No, I don't know his name."

To your recollection, do you know what the timing was of when Mr. Coleman and the other individuals he was with at the time entered the alley?

A. Well, it was around 6:16. They entered the alley as the police were coming in from the other side, so the radio run again says that Officer Ball arrived at 6:16.

Q. Do you recall whether any counsel at the time of trial requested disclosure of the names of the men that were seen running in the alley?

A. Yes, Michele Roberts did.

MS. WESTON: If we could go to JX001.

THE WITNESS: She actually requested the names in her discovery – her first discovery letter in September, I believe.

[1666] BY MS. WESTON:

Q. And did you disclose those –

A. Or in August.

Q. Did you disclose those names in response to that discovery letter?

A. No, and she documented the fact that I did not disclose it in that earlier letter, as I recall.

Q. And did she then raise it again at the time of trial?

A. Yes.

MS. WESTON: And if we could go to – I'm sorry, dash 02323.

BY MS. WESTON:

Q. I believe beginning at line 7.

"Ms. Roberts: Your Honor, this is an unrelated matter. There's going to be an objection. We might as well hear it now. I intended to ask this witness about his having attended a lineup on the 18th of October. My client stood in. This witness identified someone other than my client."

THE COURT: Can you slow down? I need some context. I don't know who this witness is.

MS. WESTON: I'm sorry. I believe this is referring to Mr. Freeman.

THE COURT: Okay.

[1667] BY MS. WESTON:

Q. At line 11: "This witness identified someone other than my client. Mr. Goren indicated that he would object. It's beyond the scope. If that's beyond the scope.

"The Court: It is beyond the case, Ms. Roberts.

"Mr. Goren: Yes.

"Ms. Roberts: I will call him in my case.

"The Court: Wait a minute. Just one at a time, Ms. Van Susteren."

And then it goes on to another issue.

Do you recall whether Judge Scott ever ordered the disclosure of the names of Mr. McMillan or

Mr. Merkerson?

A. He did not.

Q. Do you recall whether or not Ms. Roberts ever raised the issue in her case?

A. There's –

THE COURT: I'm sorry. I'm getting a little lost here. Why is this a reference to McMillan? Is that the person that Freeman identified?

MS. WESTON: Yes, and I'm sorry, I was going to come back to that.

BY MS. WESTON:

Q. If you have an answer to the Court's question.

[1668] A. Mr. Freeman, this was, again, before I got involved in the case, I believe, Mr. Freeman was asked to come to a lineup to see if he could identify the people who were running through the alley. I don't recall who was in that lineup other than Mr. Harris and I think the point – at that point Mr. Harris was the only person arrested and there was an interest on the part of the police to see whether or not he was one of those two people.

I don't recall whether Mr. Merkerson or Mr. McMillan were either identified at that time or in that lineup. I haven't seen a lineup picture either, so . . .

Q. Do you recall whether Mr. Freeman identified Mr. McMillan or Mr. Merkerson after the night of the offense?

A. After the – he – at some point, he did, I think, from photographs. And there were other identifications. And I know that there's at least other reference in this transcript somewhere beyond that in which Ms. Roberts again says that I will call Mr. Freeman as my own witness. And there's conversation – discussion about the identification of the two people who were running in the alley beyond this.

Q. And we'll get to that citation. I don't have [1669] that right now, but we will find that citation. During that conversation, if you recall, was there a point

where you were asked specifically on the record at trial to disclose the names of the two men in the alley?

A. I believe I was and I believe I said I didn't think it was Brady and I wouldn't do it.

Q. And do you recall what the reason – what your basis was, on the record, for why you were not going to disclose those names?

A. Yes.

Q. What was it?

A. Just to give some context to it, it was the policy of the office at the time to disclose under Brady and under all rules, whatever we were obligated to, if we weren't obligated, we weren't doing it. I didn't feel that this was Brady because these two gentlemen had come into the alley at, sometime after the murder, at least 15 minutes after the murder. Mrs. – Ms. Fuller's body was discovered at six o'clock.

Two or three times people had gone back into the alley after the discovery and there was nobody there. It was clear that Mr. Merkerson and Mr. McMillan had not entered the alley for at least that 16-minute period. Ms. Fuller was killed before six o'clock. We didn't know when. I think I made the argument at trial that it was as [1670] much as an hour and-a-half before the police arrived.

Q. What was the basis for that position?

A. The estimates of – it was a combination of things, the estimates of the time of death by the medical examiner and the information we had about when Ms. Fuller left her house. The other thing that we knew was that there were some people who had walked through the alley, again, according to the witness summaries that I had, about 5:30 and said

that they heard some kind of moans coming from the garage. They did not look or inquire. So that's 30 minutes before the body was found.

So my argument then, was that Mr. McMillan had not – and Mr. Merkerson had not come through the alley around the time of the murder, it was well after the murder. There's testimony at trial that they did not – well, Mr. Coleman in his statement says that they came in after Mr. Coleman did and ran past them. They immediately fled when they saw the police.

They did not look in the garage, they did not pay any attention to the garage. They had no connection with the garage. I didn't feel like this was Brady material in any way.

MS. WESTON: I believe we may have found the other transcript citation and if I could get the page number.

[1671] MR. SWEENEY: I don't have it on this, but I'm just going to calculate from the actual page numbers.

MS. WESTON: Okay.

BY MS. WESTON:

Q. While we're trying to find that, do you recall if at any point the Court ordered you to disclose the identities of the individuals?

A. No. My memory is that because Ms. Roberts said – well, I'm just going to call this witness on my own case, he postponed making – Judge Scott postponed making any ruling on that.

Q. Had you disclosed prior to trial the fact that two men were running from the alley at the time of the offense?

A. Yes.

Q. Or shortly thereafter?

A. Yes. Ms. Harris – Ms. Roberts knew it at the discovery conference we had in August. There's some statement about that in her letter to me confirming what I told her.

THE COURT: You said in the course of your response, I think you said two witnesses or at least two witnesses had been in the alley and no one was there.

THE WITNESS: Right.

THE COURT: What was that a reference to?

[1672] THE WITNESS: Mr. Freeman who was working with a vendor on the corner of 8th and H, went back into the alley at six o'clock to go to the bathroom, he – I don't know whether he opened the door or the door was opened. He opened the garage door and, to urinate in the garage. That's when he saw her body. It was at six o'clock, he said. He came out, there was no one present at the time.

He came out of the alley and – and, again, I only know this from having reviewed the records, but he came out of the alley and went back to the vendor, Mr. Robinson, and told him what he found. Mr. Robinson and Ms. Tylie, Jackie Tylie went back into the alley to look at the body at that point.

Mr. Freeman stayed at the vendor stand. Mr. Robinson and Ms. Tylie saw the body and no one else. They came out and Mr. Robinson asked Ms. Tylie to go call the police. She had called the police, I think the police call came in at about 6:07, if my memory is correct. And it's my memory of the records, not my memory of the time.

They waited for the police and at about 6:15 they entered the alley, or 6:16, according to the police radio run. I don't remember when the police radio run went out but Stephen Ball, the officer who arrived said that she arrived at 6:16, and it was at that point that Officer Ball, Mr. Freeman, Ms. Tylie were coming into the [1673] alley from, I believe, the 8th Street side.

Mr. Davis, Mr. Wigfall, Mr. Coleman, I think Charnita Speed were coming in from the 9th Street side and it was at that point that, according to Mr. Coleman, two people ran past them from 9th Street into the alley toward the garage when they saw the police. They ran up the alley, there was a cut in the alley that goes north, I guess, toward I Street.

So does that explain it?

THE COURT: Yes, sir.

BY MS. WESTON:

Q. Do you have any knowledge of where Mr. McMillan lived?

A. He lived off that alley. I think he lived on 8th Street off that alley. when I said they ran up the cut toward I Street, it was somewhere in that direction. I don't remember the address.

Q. I'm told that we now have the citation to the transcript. Looking at what appears to be JX001-02324 –

MS. WESTON: Brief indulgence, as I find the line –

BY MS. WESTON:

Q. Okay. Line 11. Again, this is referring to Mr. Freeman.

"Ms. Roberts: Well, to the extent that – let [1674] me say this: Mr. Goren did concede that Mr. Freeman's identity was Brady when we asked for his identity. We got it. I'm now suggesting that to the extent that other persons were identified by Mr. Freeman as being the persons he saw running out of the alley, that's also Brady, and I'm asking Mr. Goren, of course, through the Court, whether or not he intends to turn over the names and identities of the persons that were identified by this witness as the men he saw leaving the alley and that he clearly doesn't identify my client as being the man. That's something I'll bring in my case.

"Mr. Goren: I said this to Ms. Roberts. I don't know if I said it to anyone else, but I know I said it to Ms. Roberts because of this lineup issue. I did not consider his identification to be Brady. In fact, the people he was talking about were people who were in the alley an hour and-a-half or so after Ms. Fuller was killed. They were coming from 9th Street. They never went in the garage. They never had any association with the garage. They ran when the police came into the alley for whatever reasons, no one will ever know.

It didn't seem to me that that was Brady in any way. In fact, nor was the identification procedures that may or may not have been used with Mr. Freeman to find out who they were, of the names of any people that he might [1675] have identified in photographs.

"The Court: Do we have to take that up at this moment?

"Ms. Roberts: Not if we're not going to.

"The Court: Because this jury –

"Ms. Roberts: That's fine, since the Court has ruled it's beyond the scope I'll call him in my case.

"The Court: All right.

"Ms. Roberts: I don't mind tabling the issue until then.

"The Court: All right. Thank you. Anybody else?"

To your recollection, did Ms. Roberts ever raise the issue in her case?

A. No, I just noted that Mr. Alston also joined in that motion and he never raised it either.

THE COURT: I'm sorry. I'm still a little bit confused. I hate to be persistent, but I don't know from anything you've read that the – I don't know today that the persons or person or persons Mr. Freeman identified is McMillan, and he doesn't remember whether McMillan was in the lineup where he did not pick Mr. Harris. So how do we know this whole discussion pertains to McMillan?

MS. WESTON: I think what it pertains to, Your Honor, is the disclosure of the identities of the people [1676] that were identified in the alley. And there's been clear testimony from Mr. Goren that multiple individuals identified McMillan and Merkerson as the two individuals running from the alley.

THE COURT: So the fact that she ties it to Freeman doesn't really matter because those people do exist?

MS. WESTON: Correct. There are people. She's clearly asking for the identities and we knew the identities through various witnesses.

THE COURT: That's a fair point. Okay.

BY MS. WESTON:

Q. You've indicated as part of your timeline basis for your argument before the Court some other individuals that were walking through the alley and heard a moan. Who were those individuals, if you recall?

A. There were four people who we interviewed, who said that they were in the alley sometime – the time is a little hard to pin down but about 5:30 or 5:45, according to the witness summary notes that I've reviewed. They were a man by the name of Willie Luchie, Ronald Murphy, Jackie Watts and I think a man by the name of Samuel Edwards.

They were – either had been drinking or were on their way to a liquor store to get some alcohol to take [1677] back and drink back at their – at the Watts' house, I believe. And we interviewed all of them. I believe two of them indicated that they actually heard some kind of moan as they walked through that alley. A couple of them did not. They did not look in the garage or inquire in any way.

Q. Did any of them indicate whether there was other individuals in the alley at the time they were walking through and heard that?

A. I believe they said there was nobody else in the alley at the time.

MS. WESTON: Brief indulgence.

THE COURT: We're going to take a break at some point. Is this a good time?

MS. WESTON: That's fine.

THE COURT: All right. we'll take ten minutes, please.

(Court in recess from 10:49 a.m. until 11:05 a.m.)

THE DEPUTY CLERK: Court is again in session. Please be seated and come to order.

BY MS. WESTON:

Q. Mr. Goren, one last question with regard to – actually, I want to clarify one thing. I believe that you testified previously that Mr. Davis, Mr. Coleman and [1678] Mr. Wigfall testified at trial. Is it your understanding that they testified at trial or in the grand jury?

A. No, in the grand jury. They were announced as potential witnesses, I think, at trial, but I don't recall whether they testified.

Q. If any witnesses had identified Mr. McMillan's photo from the photo book that was shown, what would you have done with that information?

A. Identify –

MR. POLLACK: Objection. Hypothetical and speculative.

THE COURT: Could you ask your question again, please?

BY MS. WESTON:

Q. Was Mr. McMillan's photo in the book?

A. Yes.

Q. If witnesses had identified him, what would you have done with that information?

MR. POLLACK: I object because it's speculative.

THE COURT: I'll permit the question.

THE WITNESS: Identified him as a participant in the murder.

BY MS. WESTON:

Q. Would you have charged him in this case?

A. Absolutely.

* * *

[1682] Q. Mr. Goren, are you familiar with the witness by the name of Maurice Thomas?

[1683] A. Yes.

Q. Are you familiar with a statement that he made indicating he went home after witnessing part of the events of October 1, 1984 and told his Aunt Barbara what he had seen?

A. Yes.

Q. And are you aware – did you ever attempt to talk to Aunt Barbara?

A. I believe I did. There's a witness summary of – actually, I don't know if there's a witness summary of – her name is Barbara Harris – but there's a notation in the witness summary about Maurice Thomas that indicates I did talk to Barbara Harris.

Q. And would that witness summary refresh your recollection as to the specifics of what went on with the conversation with Ms. Harris?

A. Yes.

MS. WESTON: If I could have JX002-062. And if we could just enlarge the block of writing.

BY MS. WESTON:

Q. Is this the witness summary note that you referred to relating to Maurice Thomas?

A. Yes.

Q. And as you look at this, directing your attention to the last paragraph above the line, beginning [1684] with, "Maurice says that shortly after he got home he went to the store to buy Aunt Barbara a soda. At the corner he saw" – oh I'm sorry, I'm in the wrong paragraph.

Going up one paragraph. Beginning with "all he told Barbara was someone was getting beat up in the alley. She told him to forget it and not talk to anyone about it. He never did. Barbara, whose real name is Dorothy Jean Harris, and who he had talked to before, does not recall Maurice ever telling her anything such as this. She is a bit of an alcoholic who is presently in a treatment program but Maurice says that she did not appear drunk to him."

Does that refresh your recollection as to a conversation you had with Ms. Harris?

A. Well, I still don't remember the conversation with Ms. Harris. I mean, that's, I assume, an accurate description of what that conversation resulted in.

THE COURT: Well, just in terms of your methodology in making these notes, what this sentence says that Ms. Weston just read to you is, Barbara, whose real name is Dorothy Jean Harris and who we had talked to before does not recall Maurice ever telling her anything such as this. Does the "we" necessarily include Jerry Goren when you use it in that form in that kind of a note?

THE WITNESS: Yes.

[1685] THE COURT: In other words, if you were referring to the fact that the detectives talked to you –

THE WITNESS: I would have said detectives. And I also would have, if she had said he did not say this to

me, I would have put that down. I mean, I think what this says is that she didn't remember.

BY MS. WESTON:

Q. Do you have any recollection of her ever saying that conversation did not happen?

A. No.

Q. Do you recall whether you provided the address of Ms. Harris and Mr. Thomas to defense counsel?

A. There was a lot of discussion at trial about Ms. Harris and her location, her address, all of her identifying information was available at trial and there was conversation about that on the record.

Q. In this same note, there appears to be a footnote discussing two different Maurices.

A. Right.

Q. I want to direct your attention to the starred section below the line, which reads: "We also finally found the girl who told us about the Maurice who knew about the murder and let her see Maurice Thomas. She said that he was not the right Maurice. She led us to Maurice Murray, a second, slightly effeminate 14-year-old Maurice. [1686] He turned out to know very little about this but made for great jokes about stereo gay Maurices, one at each end of the alley."

Did you write that?

A. Yes.

Q. And do you recall there being two different Maurices interviewed in connection with this case?

A. I don't recall, but I believe that's an accurate statement of what happened.

Q. And to your recollection, Maurice Thomas, when interviewed, did he have details regarding the murder of Ms. Fuller?

A. Yes.

Q. Did Maurice Murray have details regarding the murder of Ms. Fuller?

A. No.

Q. Did you ever have any question that Maurice Thomas was the individual who had witnessed part of the events?

A. No.

* * *

[1779] Q. Now, at this interview with Eleby and Porter, again, you weren't there but your understanding, Eleby claimed to have been in a car and heard an admission from Calvin Alston, correct?

A. Correct.

Q. And claimed that Kay Porter was in the car with her and also heard that admission, correct?

A. Well, from what I read, the way the conversation went was that she reported this conversation and she would turn to Kay and say, right, Kay? And Kay would agree. At some point fairly quickly in the interview, apparently Detective Sanchez took Kay Porter out and interviewed her separately, but she continued to say, at that point, that she heard the conversation.

Q. And then later in December, Porter comes back in and admits that she had lied when she was in there and claimed to have heard that conversation, correct?

A. That is correct.

Q. And Eleby also admits that Porter, in fact, was not there for the conversation?

A. That is correct.

Q. And then Eleby proceeds to give you a whole bunch of other names of people who were supposedly there for an Alston admission in a car, correct?

[1780] A. She gave us a number of other names, nicknames and full names, of people who were in the car when she overheard the conversation. I don't recall that she could tell us who heard it, but she did give us a number of answers. All of them we attempted to interview.

Q. And then separately, Ms. Porter says, well, I didn't hear the admission by Alston, but I heard an admission by Catlett?

A. Yes.

Q. And both Ms. Eleby and Ms. Porter testified at trial as government witnesses?

A. Yes.

Q. Ms. Eleby testified, amongst other things, of about hearing the admission from Alston, correct?

A. Yes.

Q. And Ms. Porter testified, among other things, hearing the admission from Catlett, correct?

A. Yes.

Q. And you already testified on direct that you did not disclose to the defense that Ms. Porter had previously lied by claiming she had overheard the Alston admission, correct?

A. I did fail to do that.

Q. I took it from that, but I'm not sure if you said explicitly, that you also did not disclose to the [1781] defense that Ms. Eleby had asked her to lie about that and herself lied about.

A. I don't think I disclosed this particular lie either way. We did put on the record that Ms. Eleby had not told us the truth from the beginning and had changed her story over time. I did not do that with Ms. Porter.

Q. Right. But even with Ms. Eleby, while you said that she had changed her own story, you did not disclose to the defense that she had asked another witness to lie?

A. I did not do that.

* * *

[1794] Q. And with Eleby, you got her new version of the Alston admission, that it wasn't Porter that was in the car, it was a number of other people that were in the car, correct?

A. Well, it wasn't a new version of the statement; [1795] she excluded Ms. Porter. I don't recall what she said to the police about who else was in the car when she initially spoke to the police. I don't know whether those names were there or not. I just don't remember. But she did not – she didn't alter the basics of the statement that she heard.

THE COURT: Before Alston pled guilty, did you need or want to get as witnesses some of the people – now that you knew Porter was not in the car, did you want to get some of the people who she said was in the car?

THE WITNESS: We did. As witnesses at the trial?

THE COURT: Yeah.

THE WITNESS: We did find two people, Sharon Harrison and Antoinette Clay (ph) who were in the car and who confirmed that they also heard that statement.

THE COURT: They didn't need to testify after Alston pled guilty, or they did testify?

THE WITNESS: They did not testify after Alston pled guilty. Carrie Eleby, I think, at some point testified about that statement, but it was not in the context of trying to convict Calvin Alston. And I believe that both Antoinette Clay and Sharon Harrison were announced as potential government witnesses, but I'm not sure.

[1796] They may not have been because we would have done that in voir dire after Mr. Alston pled. So I'm not sure about that.

I'm sorry.

BY MR. POLLACK:

Q. No, that's quite all right. I want you to respond to the Court's question. I guess, back to what we were discussing –

THE WITNESS: Let me just say one thing to the judge. I'm sorry.

We also interviewed everybody else who was in that car, and while none of the others said they heard the statement, they confirmed the ride and they confirmed the fact that Carrie was sitting with Mr. Alston in the front seat and that there was a conversation, they didn't hear it.

I'm sorry.

BY MR. POLLACK:

Q. No, no, I appreciate that.

So initially, she said Kay Porter was there. Later she said Kay Porter was not there and she named the following individuals who were in the car. Tell me if this is correct.

A. I don't know if I'll remember all of them.

Q. Jimmy, who was Mathew James Harrison; Smurfette, [1797] Linda Jacobs; somebody named Cee Cee; somebody named Tony; somebody whose nickname was Hitman, who was Darryl Scott; somebody whose nickname was New Balance; Antoinette Gray or Clay and Sharon Harrison; is that correct?

A. Well, that sounds familiar. I don't remember if that's the entire list or not. It sounds right.

Q. So let's look at JX2 at 00054. Let's start in the middle of the highlighted portion. It says, "Meanwhile, Kay was talking with Ruben Sanchez when McGuinness and Gossage came out and told Sanchez what Carrie had said. Sanchez confirmed that Kay, who Carrie indicated was with him in the car, also overheard this conversation. That's the first conversation.

"In late December, when they both came back down to my office, Kay denied being in the car and overhearing this conversation. She said Carrie had said to her something in the car coming down with Gossage and that she had played along with having overheard this conversation. Carrie confirmed that Kay was not in the car and went on to name a number of people including herself and Calvin, Jimmy, Smurfette, Cee Cee, Tony, Hitman, New Balance, Antoinette Gray, Sharon Harrison."

Does that refresh your recollection as to whether she only gave you that list of names on the second occasion

after she conceded and Porter conceded that [1798] Porter had not been in the car?

A. You know, I just don't – I don't know enough about the first conversation to know what names she might have given or not. I know that when we talked more in December these are the names she gave me.

Q. In any event, that would put eight people in that car in addition to Ms. Eleby?

A. That's what it says.

Q. And you interviewed all eight of those people?

A. I did.

Q. And only two of them confirmed the conversation?

A. Yes, only two of them confirmed the conversation.

Q. And this is after you knew that she had already successfully put up somebody else to claim that Alston had made this conversation, that falsely claimed that Alston had –

A. Yes.

THE COURT: Did Calvin Alston ever tell you that he had made the statement in the car?

THE WITNESS: Yes.

BY MR. POLLACK:

Q. And when did Calvin Alston first tell you that?

A. I don't remember. After he pled guilty and agreed to testify, I think.

* * *

[1834] SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
CRIMINAL DIVISION

Criminal Action Nos.
1984 FEL 8612
1984 FEL 8616
1984 FEL 8614
1984 FEL 8615
1984 FEL 8617
1984 FEL 8513
1984 FEL 8613

UNITED STATES OF AMERICA,
Plaintiff,

v.

CHRISTOPHER TURNER, KELVIN SMITH,
LEVI ROUSE, CLIFTON YARBOROUGH, TIMOTHY
CATLETT, CHARLES TURNER, RUSSELL OVERTON,
Defendants.

Washington, DC
May 7, 2012

The above-entitled matter came on for motion before the Honorable Frederick Weisberg, Associate Judge, in Courtroom Number 202, commencing at 2:03 p.m.

THIS TRANSCRIPT REPRESENTS THE PRODUCT OF AN OFFICIAL REPORTER, ENGAGED BY THE COURT, WHO HAS PERSONALLY CERTIFIED THAT IT REPRESENTS THE TESTIMONY AND PROCEEDINGS IN THE CASE AS REPORTED.

Kellie M. Humiston, RMR, CRR
Official Court Reporter (202) 879-1026

APPEARANCES:

On behalf of the Government:

MS. KACIE WESTON and MR. JAMES SWEENEY
Washington, DC

On behalf of the Defendant Christopher Turner:

MR. BARRY POLLACK
Washington, DC

On behalf of the Defendant Kelvin Smith:

MR. DONALD SALZMAN
Washington, DC

On behalf of the Defendant Levi Rouse:

MS. VERONICE HOLT
Washington, DC

On behalf of the Defendant Clifton Yarborough:

MR. ROBERT CARY
Washington, DC

On behalf of the Defendant Timothy Catlett:

MR. LAUCKLAND NICHOLAS
Washington, DC

On behalf of the Defendant Charles Turner:

MS. JENIFER WICKS
Washington, DC

On behalf of the Defendant Russell Overton:

MR. MICHAEL ANTALICS
Washington, DC

* * *

[1884] Q. Okay. So when you testified on direct that Mr. Campbell was one of the people that gave you confidence in Mr. Alston's version of the events, that was based solely on this videotaped statement of Mr. Campbell?

A. In terms of Mr. Campbell?

Q. Yes.

A. Yes. Mr. Campbell gave us independent – again, an – a seventh or eighth version, a seventh or eighth time somebody who was not given any information by myself or by any of the police officers told us about the murder of Catherine Fuller and described the basic event in the same way: that there were people in the park, that they saw a victim, that they were singing about it, that they split up, that they went into the alley from different sides, that somebody grabbed her, that they beat her very badly, that they took her down in the garage, that they knocked her to the ground, that they grabbed her – dragged her into the garage, that – that somebody, and in all cases other than this one, it was Levi Rouse, took and inserted some kind of metal pole into her rectum and they left her there [1885] to die.

In those ways, Mr. Yarborough's original statement, Mr. Alston's videotaped statement, Mr. Yarborough's videotaped statement, Mr. Franklin's videotaped statement, Mr. – Mr. Montgomery's testimony to us, Mr. Webb who told us, Mr. Taylor who later told us, and in fact Mr. Bennett in his original statement and his grand jury, and Mr. Campbell, who was the least believable of all of them, all told us the same thing about the essential facts of this case.

And so to that extent, knowing that – that these were independently stated versions of what happened, knowing that I did not provide any of that information, nor did the police, given that most of these things happened in my presence, I believed this story. And in that way, to the extent that Mr. Campbell's version accorded with that, I believed it.

Did I believe he was being honest about everything? No. In all of the videotapes, I think every one of these people certainly minimize their own role in it, if not denied it.

* * *

[1936] Q. I believe you were asked, I don't recall which day [1937] it was, about the conversation overheard between Calvin – or the statement overheard Calvin making in a car. Do you recall those questions?

A. Yes.

Q. And I believe you were asked at some point whether only two of the people in the car confirmed that conversation. Do you recall being asked that question?

A. I do.

Q. And how many people confirmed the substance of the conversation in the car?

A. Well, two other than Miss Eleby confirmed hearing the conversation and repeated it in much the same way that Miss Eleby did. A number of the other people confirmed the – being in the car with the same people and hearing Carrie having a conversation with Calvin but not hearing the words.

Q. And were the two people that overheard – that corroborated the statement in substance known as Peebles and Petey?

A. Yeah. Sharon Harrison and Antoinette Clay.

Q. And do you recall whether or not they were named as Government witnesses for trial?

A. I believe they were.

* * *

[1949] SUPERIOR COURT OF THE DISTRICT OF COLUMBIA CRIMINAL DIVISION

Criminal Action Nos.

1984 FEL 8612
1984 FEL 8616
1984 FEL 8614
1984 FEL 8615
1984 FEL 8617
1984 FEL 8513
1984 FEL 8613

UNITED STATES OF AMERICA

Plaintiff.

v.

CHRISTOPHER TURNER
KEVIN SMITH
LEVI ROUSE
CLIFTON YARBOROUGH
TIMOTHY CATLETT
CHARLES TURNER
RUSSELL OVERTON

Defendants.

Washington, DC
May 8, 2012

The above-entitled matter came on for motion before the Honorable Frederick Weisberg, Associate Judge, in Courtroom Number 202, commencing at 10:36 a.m.

THIS TRANSCRIPT REPRESENTS THE PRODUCT OF AN OFFICIAL REPORTER, ENGAGED BY THE COURT, WHO HAS PERSONALLY CERTIFIED THAT IT REPRESENTS THE TESTIMONY AND PROCEEDINGS IN THE CASE AS REPORTED.

Kellie M. Humiston, RMR, CRR
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[1950] APPEARANCES:

On behalf of the Government:

MR. JAMES SWEENEY and MS. KACIE WESTON
Washington, DC

On behalf of the Defendant Christopher Turner:

MR. BARRY POLLACK
Washington, DC

On behalf of the Defendant Kelvin Smith:

MR. DONALD SALZMAN
Washington, DC

On behalf of the Defendant Levi Rouse:

MS. VERONICE HOLT
Washington, DC

On behalf of the Defendant Clifton Yarborough:

MR. ROBERT CARY
Washington, DC

On behalf of the Defendant Timothy Catlett:

MR. LAUCKLAND NICHOLAS
Washington, DC

On behalf of the Defendant Charles Turner:

MS. JENIFER WICKS
Washington, DC

On behalf of the Defendant Russell Overton:

MR. MICHAEL ANTALICS
Washington, DC

* * *

[TESTIMONY OF ROBERT JEFFREY BEHM]

[1974] Q. I want to direct your attention to a woman by the name of Ammie Davis. Are you familiar with that name?

A. I am.

Q. When was your first contact with Ammie Davis?

A. I met – I called her Ammie, Ammie Davis. In early February of 1984 when I was a grand jury assistant. So the grand jury, what they did was they investigated and indicted all of the cases, all of the Felony 2's, all the Felony 1's, and then once they were indicted, they were sent to the trial division to be tried.

So normally the cases would come in, there would be an arrest, the officer would bring the case in, and you would do a grand jury investigation and you would either get an indictment or you wouldn't get an indictment. But sometimes cases came in as grand jury originals.

And there was a murder case that Homicide was investigating, Homicide of the MPD, of the Metropolitan Police Department. One of my grand jury supervisors told me that, you know, they had a witness who gave a statement, they were going [1975] to bring her up, and they wanted me to put her in the grand jury that day, and it was Ammie Davis.

So she was in custody on a – on a BRA misdemeanor. They brought her up. I read the statement. I went over

her statement with her and I put her into the – and then I put her in the grand jury.

Q. Did you – when you say you went over her statement, was that outside the presence of the grand jury?

A. Oh, yeah. Yeah. Sure. I met her in my – you know, I met her in my office. It was all pretty – it was all pretty fast, because they wanted to get her in the grand jury that day. So I put her in the grand jury that day. Do you – should I –

Q. Well, let me ask you this.

A. Okay.

Q. At the time that she had given that statement, did she identify anyone has having perpetrated the murder case that you were investigating?

A. Yes.

Q. And first of all, who was the decedent in that case?

A. His last name was Hider, H-I-D-E-R. I think his first name was David.

Q. And who did Miss Davis identify as the perpetrator of Mr. Hider's murder?

A. A guy named Tucson and a guy named Hog Head.

[1976] Q. And did she indicate whether or not any other individuals were involved with that murder?

A. She said there was a third person with them who she did not know. She said she was in an oil joint or – which – or some people call them shooting galleries, she called it an oil joint on 19th Street, and Hider came in there. And he was in there, and Tucson

and – came up with two guys and he – Tucson wanted money from him. He didn't have any money, and therefore, Tucson supposedly shot him.

The other two guys picked him up and they were carrying him out, and then she heard another shot. And she said they took him out. She – I don't know if she saw it or not, but in any event, she said they took him out and put him in a Trans – a Trans Am owned by Hog Head.

Q. Did she describe the oil joint or shooting gallery where this took place?

A. I don't know if she described it in the – in the grand jury or not, but ultimately she did. She said it was on 19th Street. And then ultimately she did a ride-by with some of the detectives, I think A.T. Johnson and maybe another detective who I wouldn't know, 5-D detective. And they went and did a ride-by, and she pointed out the house where this supposedly had occurred.

Q. Did there come a time where Ms. Davis identified the third person?

[1977] A. Yeah. See, so we had – I put her in the grand jury that day, she said she didn't know the third person. Then over the weekend, she called up the police and said that the third person was a guy named James Blue. They brought her back in the next week. And she said that she wasn't going to identify Blue, but he had threatened her over the weekend, threatened her because he knew she had been in the grand jury. And she said one of the grand jurors was from her neighborhood. She – a young woman, prob- – you know, maybe in her 20s and she had a bunch of sisters, and that she's sure that woman, you know, had – had given her name up and Blue knew it. He had

threatened her. So she wanted to come in and tell the truth about him, meaning, you know, she had lied the first time she'd been in the grand jury.

Q. What did you do with that information?

A. I think I probably put her back in the grand jury. That would have been the normal step to take. I believe I did do that.

I do recall talking to the grand juror who she said was from the neighborhood, and – and the woman was from that general area. I asked her, you know, if she knew Ammie Davis, and she said she didn't. And I said, well, I think it would be better if you didn't – if you didn't participate further in this – in this investigation. And she was kind of – she – she didn't really like that, but it was – you know, I explained [1978] to her it was the right – right thing to do, and she was okay and she didn't. So I do think I put – I do think I put Ammie Davis back in the grand jury, but I – I don't have an independent specific recollection of that.

Q. Did there come a time when Ammie Davis participated in a ride-along with police to identify the oil joint, or shooting gallery?

A. Yeah. I think it was right – I think it was right around that same time, she went out and they identified the shooting gallery. She pointed out a house. The officers came back. We got a search warrant for that house. We got an arrest warrant for James Blue. We had arrest warrants for the other two guys, too, Tucson and – and Hog Head. Tucson's name was James Oliver. I forget what Hog Head's name was. But I don't think those two guys, Tucson and Hog Head, got arrested until later on. But in any event, so they

arrest James Blue. His statement is, "I don't know what you're talking about."

And they go – then the detectives went out and did – executed the search warrant. And they hit a house, and there's, like, an older lady with her adult daughter, the house is impeccably kept and, you know, there's, you know, doilies on the chairs. And it clearly was not an oil joint. They were very nice. They took the detectives upstairs to the front room where this shooting supposedly happened. And the long and the short of it was it clearly was not an oil joint, had never been [1979] an oil joint, and it was – you know, no murder had occurred there. So – so –

Q. What did you do you with that information?

A. Well, I had great expectations that when they went there, they were going to – they were going to find what we were looking for. So they came in the next day, and I was totally surprised. And – but at that point, you know, I said – George Steele was the detective on the case, and I said, I mean, how – this – how can we have confidence in her, you know? First she goes in the grand jury and lies. Okay. That's not the most unusual thing in the world, but – when you're trying to protect somebody, but – but then this is her neighborhood. How can she pick the wrong house? You know, this is where she hung. This is where she shot heroin. How is she picking the wrong house?

Well, George thought, hey, look, you know, maybe she got cold feet. He had a lot of theories. We need to – you know, let's hang on to this and see if we can continue to investigate it and see, you know, if we can develop other evidence.

There was a guy named –

THE COURT: Did you have – excuse me, sir. I'm sorry to interrupt you. Did you have a body?

THE WITNESS: Oh, we had a body, yeah.

THE COURT: But no idea where he had been killed?

[1980] THE WITNESS: We – there was a blood trail from where he had been either shot originally or left, dumped behind Eastern High School, and it went out into the – into the street. And two guys were walking home in – in January from – they work – they worked somewhere for the Government. And they saw a body out in the street, and they went out, and he was bleeding. They thought he'd been hit by a car. He was still alive. And they – a girl came by, and she ran and called 911, or got – and the ambulance came. He was still alive. But – and he hadn't been hit by a car. He'd been shot once in the chest. And he died when they got him to the hospital.

THE COURT: Okay. I'm sorry to interrupt you, because you were in the middle of a thought.

THE WITNESS: No. That's fine. So I had – I had real significant doubts at that point about Ammie Davis.

I guess the other thing was, the other thing, after she said that Blue had threatened her, George Steele knew a guy who – who he – who was a man –

MR. NICHOLAS: Objection to what George Steele knew. I thought the question was to ask him what did he do, not what George knew –

MS. WESTON: I'll –

MR. NICHOLAS: – what did he do.

MS. WESTON: I'll ask a question.

THE WITNESS: Okay.

[1981] THE COURT: All right.

BY MS. WESTON:

Q. To your knowledge, did George Steele put Ammie Davis in protective custody at any point in that case?

A. Yes. After – after she said Blue had threatened her, it was my understanding that she was put in a motel managed by a guy who Steele knew and had used for that purpose on other occasions.

Q. And do you know how long she was in protective custody?

A. I think she was only there one night, because when Steele got to the grand jury the next morning, he – he was very upset. He was – he was really hot, because Ammie – it had been reported to him by the manager that Ammie had had a big party there and invited a lot of her – of her friends, and they were loud, they created a disturbance. The manager was angry at Steele.

And Steele came in, and he was upset with Ammie. And – and that was kind of unusual. I mean, George was a pretty calm, low-key kind of guy. He was – he was a smart guy, had gone to the Naval Academy for a couple of years and decided that wasn't for him, but he was – he was a bright guy and he usually wasn't overly emotional, and – but he was mad that day. It was kind of funny. You know, it was a little humorous to see him outside of character.

[1982] Q. Now, did you come to learn any information regarding Ammie Davis and her testimony against other individuals in any other cases?

A. Yeah, I did. I mean (pause) –

Q. When was that?

A. Well, okay. So all this stuff in the grand jury happened and – and the search all happened in the first half of February. I talked to my grand jury supervisors, told them about the problems, told them the detectives wanted to hang in there with this investigation.

But I had a guy, you know, he was locked up without bail, and it – it bothered me. That was one – that was a case that if you have 50 cases in your caseload, there's a couple you think about them and your stomach tightens up, and that was one of them for me. It worried me that I had this guy locked up and I wasn't sure at all whether our only witness was telling the truth. So I guess the other guys got locked up then, too.

Ultimately Ammie – I thought she had gotten in some more trouble and – and –

MR. SALZMAN: Object to what he thought.

THE WITNESS: Okay. Okay. At some point Ammie came forward and gave information to George Steele implicating another individual in a murder. And George –

MR. SALZMAN: Your Honor, object. Can we – can we approach?

[1983] THE COURT: All right. Would you mind stepping down for a second?

THE WITNESS: Yep.

(Bench conference commenced with Ms. Weston and Mr. Salzman)

MR. SALZMAN: Judge, the reason for my objection is that, and Ms. Weston may correct me, that there's additional information, but in discovery, we – there was included in Mr. Behm's affidavit an allegation that there was some other claim made by Amy (phonetic) Davis about another murder, not involving the Fuller murder, after the Hider murder. And we asked for information and discovery about that, and I have a discovery letter that says that there was no other information that they could find in their records.

So I don't know whether there's additional information that's been discovered, but if he – if it's based on his memory, I think, at least from discovery, his memory seems to be inaccurate. So at least that's the information that was –

MS. WESTON: Well, I –

THE COURT: I wouldn't –

MS. WESTON: I would object to that.

THE COURT: I wouldn't say the last point.

MS. WESTON: Yeah.

THE COURT: I wouldn't say the last point.

[1984] MS. SALZMAN: Well, but –

MS. WESTON: Just because there's no records of some things certainly, as we've learned in this case, does not mean someone's memory is inaccurate.

There was that discussion. We don't have any records to support it. I believe he can be cross-examined to the extent of the accuracy of his memory. I don't plan on going into length about this issue, but I think it goes to his state of mind as to what he was aware of at the time in making his determination.

THE COURT: Just so I understand the catalyst, it is in his affidavit that she gave this additional information?

MS. WESTON: Yes.

THE COURT: And the defendants – or the petitioners say, "What do you know about it? Is there anything to corroborate it?"

MS. WESTON: Correct.

THE COURT: And you said there's nothing.

MS. WESTON: We have not been able to find anything, no.

THE COURT: And there still isn't anything?

MS. WESTON: Correct.

THE COURT: I think he – I think if it's in his affidavit, he can talk about what he knew about it.

MR. SALZMAN: Okay.

[1985] THE COURT: That's fine.

MR. SALZMAN: I was just trying to find out if there was anything additional since –

THE COURT: I agree with you. If there were, and it wasn't turned over, I would be concerned.

MR. SALZMAN: Okay.

MS. WESTON: Thank you.

(Bench conference concluded)

BY MS. WESTON:

Q. I'll try to recall what my question was. I believe it was, were you aware of information regarding another allegation that Ammie Davis had made against another individual?

A. Well, yeah. Let me – let me – let me tell you. We dis- – I – at some point in April or May, I went to my grand jury supervisor, gave him some information, and he authorized me to dismiss the – the charges against the three – all those individuals, and they would be released from jail.

And the reason I did that, and the information that was given to me was George Steele came in and told me that Ammie Davis had recently implicated another individual in another murder, and that he had checked that out, and that the person who she had implicated in the murder was in the hospital on the day of the murder and that the testimony – that the evidence he gave her – that she gave him was, in his opinion, absolutely false, and he didn't want to proceed with the investigation [1986] anymore.

And I thought that was good. And I went and talked to my grand jury supervisor. I got the authorization to dismiss it, and I dismissed all the charges, based on her testimony.

Q. Now, did there come a time during your involvement with the Fuller case or in conjunction with the Fuller case that you again heard Ammie Davis's name?

A. Well, even before that, though, there were instances where Steele – Steele came and told me that Ammie Davis had made other allegations –

MR. SALZMAN: Objection. Again –

THE WITNESS: Okay.

MR. SALZMAN: If Mr. Steele is, you know, going to be a witness, that's one thing, but I think the issue is –

THE COURT: You don't intend to call him?

MS. WESTON: Again, that's within the affidavit, Your Honor.

THE COURT: Well, he can speak to it to the extent that he's already said it in his affidavit, because the defense already has that. Petitioners have that.

Go ahead.

THE WITNESS: Thanks. Well, there were other instances, and I don't remember the details, where Ammie Davis had given Steele or somebody in 5-D, who then gave it to Steele, information about James Blue that the detectives thought was not [1987] true. And Steele told me about it. And, you know, it was just basically saying, well, Ammie's blaming Blue, you know, for something else. So then –

MR. NICHOLAS: Could the witness –

MS. WESTON: Let me ask –

MR. NICHOLAS: Could the witness give us a date?

THE WITNESS: I can't – I can't give you a date, but it was being – I can't give you a date and I can't –

MR. NICHOLAS: Or the year?

THE COURT: When she gave the information or when he learned about it from Steele?

MR. NICHOLAS: Both. When he learned it from Steele.

THE WITNESS: It would have been between the spring of 1984 –

THE COURT: '85?

THE WITNESS: No. The spring of '84.

THE COURT: All right.

THE WITNESS: And before I became involved in the Fuller murder case.

BY MS. WESTON:

Q. And when was that that – again, just for the record?

A. In August of '85.

Q. Okay.

[1988] THE COURT: So it would be the – between the spring of '84 and maybe the spring of '85 or later?

THE WITNESS: Probably.

THE COURT: Okay.

THE WITNESS: In that period. That's all I – that's all the more specific I can be.

BY MS. WESTON:

Q. Did there come a time where you learned that Ammie Davis had told police that James Blue –

MR. NICHOLAS: Objection. Leading.

THE COURT: Overruled.

Q. – killed Mrs. Fuller?

A. I did.

Q. How did you learn that information, if you recall?

A. Somebody told me in my office that Sanchez wanted to see me, that there was, you know, a witness who said somebody else had – had killed Mrs. Fuller. So I went down to Jerry Goren's office and knocked on the door. Sanchez came to the door. He held the door open, but he stood in the entrance. And I – and he had asked about Ammie Davis.

I knew it was Ammie Davis who had come in. And I told Sanchez that Ammie Davis is wholly un-credible as a witness, and particularly involving James Blue; that there was a history there; that I thought she had lied to me in that investigation, and to the – and I – I'm confident I would have [1989] directed him to George Steele as well; and that she could not be believed.

Q. Do you know when that conversation took place?

A. I – I – I don't know exactly when it took place. I do know it took place at a time before I was well integrated into the Fuller murder trial team, because – when I went there, I – you know, I – I wasn't invited into Jerry's office. I still had my own office. And I didn't know Sanchez that well. That's all – that's – that's what I know.

Q. Do you recall whether or not you had a discussion directly with Jerry Goren about Ammie Davis?

A. I may have, but I don't have any specific recollection.

Q. Do you have any knowledge of whether Ammie Davis was put into a hotel or protective custody in relation to the Fuller case?

A. I have no knowledge of that.

Q. At some point did you learn that Ms. Davis was killed by James Blue?

A. Yes.

Q. How did you learn that information?

A. Well, I was on the Fuller trial team then, and they – I heard she had been shot and that Ruben

Sanchez went over and took a dying declaration from her in which she said James Blue had shot her. And I – I didn't think that was [1990] necessarily true, based on my – my prior experience with her.

MR. NICHOLAS: Objection to the opinion, Your Honor.

THE COURT: I'm sorry?

MR. NICHOLAS: Objection to his opinion. He testified –

THE COURT: Overruled.

A. I was told that there was no question about it. There were eyewitnesses.

Q. Did you have an opportunity to review the files relating to Ms. Davis's murder case?

A. Well, I'm sure I did at the time when they – when it came in, but I also have reviewed a portion of the MPD homicide file in connection with this hearing.

Q. And were you familiar with the facts surrounding that death?

A. I'm – I'm certainly familiar with them now. And I believe I was familiar with them then, but I don't have a specific recollection, you know, of actually looking at that file 25, 27 years ago. I'm confident I did, though.

Q. From your review of those files, was there any indication that Miss Davis had been killed because of her putting James Blue in the Fuller murder?

A. No, there wasn't. In fact, it really kind of supported the notion, you know, that she wasn't afraid of Blue at all, that they were –

[1991] MR. SALZMAN: Objection.

A. – dope using (pause) –

MR. SALZMAN: The record speaks for itself.

THE COURT: Yeah. Try not to give too much of your –

THE WITNESS: Okay.

THE COURT: – your own –

THE WITNESS: Okay.

THE COURT: – thoughts about it, but whatever you remember about what you observed and what you did based on it is fine.

THE WITNESS: Okay.

A. Well, the file – the eyewitnesses testified that Blue and Ammie Davis were acquaintances and sometimes did use heroin together, and that on the particular day in question, Blue didn't – didn't have any money, eventually got five bucks. Ammie had money and was going to buy some heroin. And Blue wasn't feeling good, I guess.

MR. SALZMAN: Objection to what he guesses.

MR. NICHOLAS: Objection, Your Honor.

THE WITNESS: That's what the witnesses said.

THE COURT: Go ahead.

A. And she said – he – she'd say, yeah, I'll let – I'll give you some of my heroin, and then a little bit later, she said, no, Blue, I don't think I will give you some heroin. [1992] Then she'd say, okay, maybe. And then it went back and forth.

And – and he eventually snapped and pulled out a gun and said, you don't – you don't think I'll shoot you,

do you? And she said, no, I don't, you MF. And he shot her.

Q. Do you know how that case concluded, whether it proceeded to trial or a guilty plea?

A. I know the homicide file indicates Blue came in and he initially said it was a – you know, the gun went off accidentally, shot her in the head and that – but he later pled guilty.

Q. Other than Ammie Davis, in your review of the files of the Fuller murder case, did you – were there any other indications that Mrs. Fuller was killed by one person?

A. No. It was in – I believed then and believe now it was –

MS. HOLT: Objection.

THE COURT: Overruled.

A. – that it was ver- – highly inconsistent with what the physical evidence showed, in particular the ME report.

Q. At the time that the case proceeded to trial, did you or the other members of the trial team believe that you had all the defendants who had committed the murder?

A. No. I didn't know, but I know that the detectives and Jerry did not feel that they had charged everybody who had participated in that murder.

[1993] MS. WESTON: Brief indulgence. One last thing.

Q. Mr. Behm, you indicated that in the Hider case, that that case bothered you and your stomach tightened, I believe you testified.

A. Right.

Q. Did you have any feelings like that with regard to the Fuller case?

A. No.

MS. WESTON: I have nothing further.

* * *

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AND /
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Nos. 15-1503 & 15-1504

In the Supreme Court of the United States

CHARLES S. TURNER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

RUSSELL L. OVERTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI
TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR PETITIONERS CHARLES S. TURNER, CLIFTON E. YARBOROUGH, CHRISTOPHER D. TURNER, KELVIN D. SMITH, LEVY ROUSE, AND TIMOTHY CATLETT

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QUESTION PRESENTED

Whether petitioners' convictions must be set aside under *Brady* v. *Maryland*, 373 U.S. 83 (1963).

PARTIES TO THE PROCEEDING

Petitioners in Case No. 15-1503 are Charles S. Turner, Clifton E. Yarborough, Christopher D. Turner, Kelvin D. Smith, Levy Rouse, and Timothy Catlett. They were joined in the proceedings below by Russell L. Overton, one of their co-defendants at trial and the petitioner in Case No. 15-1504. The Court granted both petitions and consolidated the cases.

The United States of America is the respondent.

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In the Supreme Court of the United States

No. 15-1503

CHARLES S. TURNER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 15-1504

RUSSELL L. OVERTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI
TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR PETITIONERS
CHARLES S. TURNER, CLIFTON E. YARBOROUGH, CHRISTOPHER D. TURNER, KELVIN D. SMITH, LEVY ROUSE, AND TIMOTHY CATLETT

OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals (Pet. App. 1a-78a) is reported at 116 A.3d 894. The order of the District of Columbia Court of Appeals denying rehearing (Pet. App. 79a-80a) is unreported. The opinion of the Superior Court of the District of Columbia denying petitioners' motions to vacate their convictions or for a new trial (Pet. App. 81a-131a) is unreported.

JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on June 11, 2015. A petition for rehearing was denied on January 14, 2016. The petition for a writ of certiorari was filed on June 10, 2016, and granted on December 14, 2016. The jurisdiction of this Court rests on 28 U.S.C. 1257(a) and (b).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law[.]

STATEMENT

This case involves the suppression of exculpatory and impeachment evidence in one of the District of Columbia's most infamous crimes—the 1984 murder and assault of Catherine Fuller, a 48-year-old mother. Lacking any physical evidence, the government went to trial against ten defendants based on purported eyewitness testimony that the defendants participated in a group attack on Mrs. Fuller. The jury deliberated for a week before returning any verdicts, and ultimately acquitted two defendants and convicted eight others. The seven surviving men convicted of this crime—petitioners here—continue to assert their innocence.

Post-conviction proceedings have uncovered compelling evidence supporting both petitioners' claim of innocence and their claim that the prosecution suppressed material, favorable information in violation of their due process rights under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and related cases. That evidence includes multiple witness statements that placed at the crime scene a violent felon with a history of assaulting middle-aged women in

the same neighborhood; multiple witness statements that groans were heard coming from the garage where Mrs. Fuller's body was found at the estimated time of death but no group was present; information that police received and then lost a potential eyewitness statement that someone other than petitioners committed the crime; and information impeaching prosecution witnesses.

After an evidentiary hearing, the trial court denied petitioners' motions for post-conviction relief, and the District of Columbia Court of Appeals affirmed.

A. The Murder Of Catherine Fuller

Shortly after 4:30 p.m. on October 1, 1984, Catherine Fuller left her home to go shopping. Pet. App. 4a. She lived approximately four blocks from the intersection of Eighth and H Streets, Northeast. J.A. 29. Although the weather was overcast, the neighborhood was bustling with activity. J.A. 146-147.

Around 5:30 p.m., a group of at least four people walked through the alley that runs parallel to H Street between Eighth and Ninth Streets. J.A. 25. A garage stands at the center of the alley, where the alley meets another. See J.A. 29 (map of area). As the group walked through the alley, some members of the group heard groans coming from the garage, and one member noticed that both doors to the garage were closed. J.A. 25, 27.

A half hour later, at 6:00 p.m., William Freeman, a street vendor working on the corner of Eighth and H, walked to the garage to relieve himself. He noticed blood pooling under one of the garage doors and saw that the other door was open. Pet. App. 4a. Looking inside, he discovered Mrs. Fuller's body in the northwest corner of the garage, one or two feet away from both the closed door and one of the walls of the garage and near an upright shoeshine box. J.A. 30 (sketch of crime scene). Debris

littered the garage floor and a large garbage cart occupied the southeast portion of the garage. The victim was naked except for her bra and sweater, which had been pushed up her torso. A2207.[1] It was later determined that Mrs. Fuller had been badly beaten and sodomized with an object. Pet. App. 4a. The object was never recovered.

Freeman returned to the street to alert the authorities and to inform others of what he had seen. A few minutes later, he returned to the garage, where he was joined by others, including Jackie Tylie and Charnita Speed. As Freeman was waiting for the police, he saw two young men run into the alley from Ninth Street whom he recognized from having seen them pace H Street throughout the day. The two men stopped by the garage and stood there for several minutes, and one of the men had "something in his coat because it was puffed up." When the police arrived, Mr. Freeman heard one say, "[D]on't run," but the two men ran anyway as the police approached. A1357.

B. The Investigation

1. At 2:45 a.m. that night, police received a tip from an anonymous caller who claimed that there was a group of young men who "hung in the alley" called "The 8th and H Crew." He further asserted that three of them, "Monk Harris, Levi, and Ernie Yarlboro [sic] * * * talk[ed]

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[1] "A" citations refer to pages in the hardcopy appendix in the D.C. Court of Appeals, which the parties have moved to be deemed additional volumes of the joint appendix in this case. An updated table of contents to that hardcopy appendix is at the end of the booklet volume of the joint appendix. See J.A. 329-340. Petitioners also submitted to the D.C. Court of Appeals an electronic appendix containing the entire trial and hearing transcripts, which were also paginated with "A" numbers. To assist the Court, references to transcript excerpts that do not appear in the joint appendix, including the hardcopy appendix, will include parenthetical references to those "A" citations.

about pulling females into the alley to rape" and had "moved a car out of the garage * * * 3 or 4 hours before the body was found." A1370. That day, police found an abandoned car with "Monk of [the] 8th and H crew" written in the dust. A1365.

On October 3, police spoke with petitioner Rouse and Vincent "Boo" Gardner. A1375, A1385. Both Rouse and Gardner were friends with Mrs. Fuller's son David, and remained so after his mother was killed. A1385. Rouse and Gardner repeated to police the rumors swirling in the neighborhood, among them a story that Ernie Yarborough, Alphonso "Monk" Harris, and Rouse had killed Mrs. Fuller, possibly by stabbing, for $3,000 in jewelry. All three denied any involvement. A1375, A1385.

The next day, the police picked up and interviewed brothers Ernie Yarborough and petitioner Clifton Yarborough. A1388. Clifton Yarborough was 16, had an IQ below 70, and could read at only a third- or fourth-grade level. A1846-A1849, A2073. According to the government, the detectives separated him from his older brother and told Yarborough that they knew he was at the scene of the murder, that he was lying if he denied it, and that if he continued to deny knowing about the murder, he could end up being charged with the crime. A2040. Yarborough gave the police a statement, telling them that Harris had told him that Harris, Rouse, "Burt," "Darrin," "Warren," and "Fellow" robbed Mrs. Fuller. A1178. Police arrested Harris that day, including in the warrant application that seven additional individuals were believed to have participated in the attack. A1568-A1570.

2. The police had no physical evidence to identify the perpetrator or perpetrators. On October 18, the detectives brought Harris in for a lineup in the hope that Freeman would identify him as one of the two men who had acted suspiciously in front of the garage. A227-A228,

A1291. Freeman did not do so. For the next month, the investigation stalled as the detectives grew frustrated that community members did not come forward to support the group-attack theory. See A2484-A2485.

When interviewing young people they thought may have knowledge of the crime, the detectives adopted aggressive techniques—including yelling, slamming their hands on desks, and threatening witnesses that they would go to jail if they "did not come clean and finger others." Pet. App. 15a n.11. At petitioners' post-conviction proceeding, witnesses who were never arrested or called at trial confirmed the detectives' methods. A2282-A2283, A2594-A2595.

The "break" in the investigation occurred in late November, when a detective interviewed Carrie Eleby about an unrelated nightclub fight. Ms. Eleby was sixteen and a PCP user; as a clinical psychologist had previously determined, she had an IQ of 63, and was "interested in thrill seeking behavior and immediate impulse gratification." A1343-A1344. While being questioned, Eleby spontaneously volunteered that she knew who had killed Mrs. Fuller. At the detective's request she came to the police station the next day to give a statement. Eleby claimed that a man named Calvin Alston had confessed to her and Kaye Porter that he and several other people had been involved in the murder. Pet. App. 22a. She also brought along Porter to corroborate her story, which Porter did. Porter would later confess to a prosecutor that she had made the story up at Ms. Eleby's behest and that she had never heard Alston confess. *Ibid.*

Based on Eleby's statement, the police arrested Alston. After Alston denied any involvement in the crime, one of the detectives told him he faced life in prison if he did not talk to them, comparing the crime to a pie in which Alston could have either a slice or the whole thing. 11/7/85

Tr. at 139-141 (A6524-A6526). After further questioning by detectives, Alston eventually described witnessing a group assault in a videotaped statement. As he told the detectives, he thought giving the statement would allow him to be "a free man." A1175. Much of Alston's statement was objectively false. For example, he drew a diagram placing the sexual assault on the south side of the garage, approximately where a large trash cart was located. Compare J.A. 59 (Alston sketch) with J.A. 30 (crime-scene sketch). As the government conceded in the post-conviction proceeding, the sexual assault took place at the other end of the garage, where Mrs. Fuller was found. A2603.

Police arrested four individuals whom Alston named in his statement—petitioners Yarborough, Timothy Catlett, Russell Overton, and Christopher Turner. The same detectives who interrogated Alston also interrogated Yarborough. In addition to the techniques used on Alston and other witnesses, the detectives acknowledged engaging in a theatrical good cop/bad cop routine designed to be "intimidating to the witness." A2564. According to the detectives' own account, one of them yelled at Yarborough repeatedly and pretended to be so enraged that he had to leave the room, only to pound on the door and yell "Let me back in!" A2469-A2470. That same detective later stormed into the room and "either pretended to or actually did tear off his t-shirt for dramatic effect." Pet. App. 68a. He later testified that these techniques were intended to convince Yarborough that "he would be better off if he told [the detectives] what he thought [they] wanted to hear." A2538.

Yarborough eventually gave a videotaped statement in which he claimed that he had witnessed a large group attack Mrs. Fuller. "Many of the things Yarborough said on the videotape seem unlikely when compared with other

evidence." Pet. App. 70a. One notable example involved Yarborough gesturing that Mrs. Fuller's "blouse" was ripped off her. A1035. Mrs. Fuller's sweater had not been ripped off of her; the perpetrator pushed it up her chest. A2207. And, like Alston, Yarborough described Mrs. Fuller being sexually assaulted in the wrong location: according to Yarborough, outside the garage entirely. A1033.

Two months later, on February 6, 1985, the same detectives interrogated Harry Bennett, again threatening that he alone would be found responsible for Mrs. Fuller's death if he failed to "come clean and finger others." Pet. App. 15a n.11. Like Alston and Yarborough, after hours of interrogation, Bennett gave a videotaped statement that got basic facts about the crime scene wrong: he also had the sexual assault occurring in the wrong location, such that he could see it through an open garage door. A1090.[2]

C. The Trial

1. The government originally charged seventeen people for participating in the assault on Mrs. Fuller. Pet. App. 83a n.3. A grand jury later indicted thirteen of the seventeen. Bennett and Alston pleaded guilty to reduced

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[2] In May 1985, James Campbell gave a videotaped statement to police that was not used at trial. Both the lead prosecutor and detective disbelieved parts of Campbell's statement, with the prosecutor describing him as the most "exaggerated" witness, A2414, and the detective more colloquially describing Campbell as "full of s--t." A2588-2589. According to Campbell, Carl McPhail (not implicated by anyone else) attacked Mrs. Fuller with a golf club (not mentioned by anyone else), and Harris brandished a gun (also not mentioned by anyone else). 5/7/12 Hr'g Tr. at 1877-1879 (A13249-A13251). Campbell, also alone among the individuals to give statements, identified James McMillan as being in the alley. 5/7/12 Hr'g Tr. at 1889-1890 (A13261-A13262); but see A1113 (Bennett stating McMillan was not there).

charges in return for their testimony against the other defendants. Campbell's trial was severed after his attorney became ill; he later pleaded guilty to lesser charges after petitioners' convictions. The cases against the remaining ten defendants—the seven petitioners, Harris, Felicia Ruffin, and Steven Webb—proceeded to trial. Pet. App. 5a.

The prosecution's theory was that the ten defendants, along with others, had been hanging out in the park on the south side of H Street. Some of the group decided to commit a robbery, and one of them pointed to Mrs. Fuller as she walked down a nearby street. They crossed the street after her and forced her into the alley, where they beat and kicked her. Mrs. Fuller was then dragged into the garage, where she was held down while Rouse sodomized her with a pole. While most of the perpetrators then left, the prosecutor argued, someone stayed behind to move Mrs. Fuller's body to the corner of the garage, where it was found. J.A. 149-156.

2. The lead prosecutor has admitted that the trial "easily could have gone the other way." A1751. The prosecution did not have any physical evidence tying petitioners to the crime. And, despite the heavy foot traffic that day and the many houses and businesses that backed up on the alley, J.A. 29, 146-147, the prosecution did not have any corroborating testimony from adults that they saw or heard a group pursue and assault Mrs. Fuller.

a. One of the prosecution's first witnesses was Freeman, the street vendor. He testified to working at a stand on the corner of Eighth and H throughout the day on October 1, and to discovering Mrs. Fuller's body. A202-215. He also testified about "two dudes" who ran into the alley from Ninth Street and stayed until the police arrived. A215-A220. Through pretrial disclosures, Harris's counsel knew that Freeman had not identified Harris in a

lineup. J.A. 62. During a hearing outside the presence of the jury, the prosecution refused defense counsel's request that it disclose the names of the two individuals whom Freeman had identified. J.A. 62-64. On cross-examination, Freeman testified that none of the defendants was one of the two men he saw in the alley. A244.

Freeman went on to testify on cross-examination that he had been monitoring the corner of Eighth and H as part of his work. A233. He testified that he did not see any group of young men hanging out or running up Eighth or Ninth Street. Nor did he hear any shouts coming from the alley. A246-247. Rather, he had noticed, and been suspicious of, the two men who had been walking up and down H Street all day and who later had waited by the garage. A237.

The prosecution's final witness in its case in chief was the medical examiner, Dr. Michael Bray. He estimated that Mrs. Fuller died at 5:30 p.m. A707. Consistent with the autopsy report, Dr. Bray testified that Mrs. Fuller died from blunt force trauma, and sustained injuries to her head, right torso, and anus, as well as abrasions to her face. A1190-A1201. She also had wounds to her back consistent with having been dragged across pieces of glass. A1199. He could not determine how many people were involved in the attack on Mrs. Fuller. Pet. App. 4a.

b. The prosecution's inculpatory evidence came almost exclusively from a small number of witnesses with pronounced credibility problems. As the lead prosecutor himself told the jury in closing, his witnesses were "young," "inarticulate," and "quite frankly * * * not very smart sometimes." J.A. 193. Many were drug dealers or had drug problems. And each had told, and would continue to tell at trial, shifting and inconsistent stories. The prosecution's star witnesses were Alston and Ben-

nett, who had each received reduced sentences in exchange for their testimony. Alston had spent the eight months after his videotaped statement writing letters to judges and government officials asserting that he had lied under pressure; he had agreed to plead guilty only after being raped in prison and losing a motion to suppress his statement. A1559, A2099-A2108. In exchange for Bennett's testimony, the government agreed both to reduce a charge for cocaine distribution to simple possession and to allow him to be released pending sentencing. A2123-A2124.

i. Although the prosecution relied heavily on Alston and Bennett, the lead prosecutor's view after trial was that the jury harbored sufficient doubts about them that it had not been willing to convict someone based on only their testimony. A1741. Alston's and Bennett's trial testimony was riddled with inconsistencies—with each other and with their own prior statements—about details central to the crime to which they had confessed. Bennett, for example, had said in his videotaped statement that two people had sodomized Mrs. Fuller. A1117. By trial, consistent with the other purported eyewitnesses, he identified only one person. A411. And, while both men testified that Mrs. Fuller's legs were held down while she was assaulted, they identified different defendants doing so. Bennett identified Alston and Webb. A410-A411. Alston identified Charles Turner and Overton. A497-A498. In Alston's case, this contradicted his videotaped statement. A1156.

Both men further modified their testimony in a way that conveniently fit the prosecution's charges. Alston's videotaped statement included Daryl Murchison's suggesting that everyone rob Mrs. Fuller. A1151. Murchison was not indicted and, by trial, Alston said *he* had sug-

gested Mrs. Fuller. 11/7/85 Tr. at 19 (A6404). In Bennett's videotaped statement, he specifically excluded Catlett, Christopher Turner, Charles Turner, and Harris. A417, A1120, A1125-A1126. At trial, however, he named them all as accomplices. A392, A411, A415.

ii. The prosecution sought to bolster Alston and Bennett's testimony with testimony from three other purported eyewitnesses: Eleby, Linda Jacobs, and Maurice Thomas.

Eleby and Jacobs were friends and had "significant credibility problems." Pet. App. 6a. As noted above, Eleby was sixteen and mildly retarded. A1005, A1343. Jacobs, a fourteen-year-old runaway, testified "with her hands in her mouth the whole time." A1009, A2269. Both were PCP users who admitted to using the drug before purportedly observing events in the alley. A535-A536, A649.

Despite supposedly witnessing the crime together, Eleby and Jacobs gave markedly different accounts. Each had differing explanations of how they came to be in the alley. Pet. App. 7a. Eleby described Mrs. Fuller lying on her stomach during the sexual assault; Jacobs said she was on her back. A1999, A1967. They even disagreed about where they watched the assault, with Eleby placing them at a fence twenty feet from the garage and Jacobs placing them inside the garage. A550-A551, A657.

What is more, each witness contradicted herself on the stand. Pet. App. 6a. Eleby claimed not to remember anything she had told investigators or the grand jury. And her testimony that she had only used PCP on the day of the crime was "unbelievable on its face." *Id.* at 46a. As to Jacobs, the court of appeals acknowledged that the jury may have "disbelieved most of [her] testimony." *Ibid.*

The prosecution's last purported eyewitness, Thomas, was only in eighth grade when he testified at trial. J.A.

112. Thomas did not claim to have been in the alley. Instead, he testified that, while walking back to his house after having dinner with his aunt at her house, he looked across Ninth Street and down the alley and saw a group attacking a woman. J.A. 114-116. Perplexingly, he claimed that the same aunt was waiting at his house when he arrived there. J.A. 120. He testified that he told her what he had seen, and she told him not to tell anyone. J.A. 121.

Like the other witnesses, Thomas changed his story over time. In his first grand jury appearance, Thomas testified to witnessing a group attack in front of the garage from a separate alley on the other side of Ninth Street. A1943-A1944. That alley, however, does not enter Ninth Street at the same point as the alley where Mrs. Fuller was attacked, making it impossible for Thomas to see the area around the garage. See J.A. 50. In his second grand jury appearance, Thomas elaborated on his account, describing a second group of people observing the assault from the Ninth Street side of the alley. A1953-A1955. But, if such a group had existed, it would have blocked his view of the crime. By trial, Thomas had altered his testimony to address both problems: Thomas testified that he had stood on the Ninth Street sidewalk, from where he could look down the alley. J.A. 128-130; A628. And Thomas flipped the two groups he claimed to see, testifying that the assault took place on the Ninth Street side of the alley, with the observing group having been further down the alley, by the garage. A629-A641. As the court of appeals noted, the jury disbelieved at least part of Thomas's testimony, as it convicted one of the defendants despite Thomas's saying he had not been in the alley. Pet. App. 47a.

iii. The government also relied on two other witnesses who indirectly corroborated the government's version of

events but did not claim to see the attack. Melvin Montgomery, a teenage drug dealer, claimed to have been in the park with some of the defendants and to have seen some of them cross H Street to rob someone. Pet. App. 7a. But Montgomery was impeached on numerous grounds; he admitted that he had denied any knowledge of the crime and only provided information to detectives when they threatened to put him in jail. A322.

Porter, who had previously admitted to the prosecution that she had lied about *Alston's* supposed confession at Eleby's behest, testified at trial that petitioner *Catlett* had supposedly confessed his involvement months after the assault. Pet. App. 8a. But she was impeached with her grand jury testimony, in which she had testified that Catlett had *not* admitted his involvement to her. *Id.* at 46a.

3. The ten defendants presented their cases through separate counsel who did not know either the identity of the two men Freeman had seen acting suspiciously at the garage or that a witness had heard groans coming from a closed garage around 5:30 p.m. The dynamic of having so many defendants and no common defense worked to the prosecution's advantage. As a leading criminal-defense lawyer told the Washington Post in an article about this trial, "[a] guy trying to extract his client has to point the finger at somebody else." Saundra Saperstein & Elsa Walsh, *Ten Defendants Complicate Trial; Murder Case Attorneys Often Find Themselves at Cross-Purposes*, Wash. Post, Nov. 17, 1985, at A1. Without an alternative perpetrator to implicate, defense counsel resorted to the defense that, while other co-defendants may have attacked Mrs. Fuller, his client was not among that group. The proceedings devolved to such an extent that, after one defense lawyer finished a supposed cross-examination of a prosecution witness, another defense lawyer was heard

muttering as he left the courtroom, "They've got three prosecutors in the courtroom now." *Ibid.*

Five petitioners, as well as Harris, presented alibi defenses. Smith and Christopher Turner testified that they spent the afternoon together at Smith's grandmother's house, and called several supporting witnesses. Pet. App. 9a. Charles Turner testified, also with several supporting witnesses, that he left the park in the early afternoon and spent the rest of the day at home and at his sister's house. *Id.* at 10a. Overton presented multiple family members who testified that he was napping at home that afternoon. 11/21/85 Tr. at 27-82 (A8608-A8764). Rouse testified to spending the afternoon at various arcades and restaurants around the neighborhood. Pet. App. 10a.

On cross-examination, the prosecution identified inconsistencies in some of the testimony from alibi witnesses. For example, Charles Turner said he was at home, which was inconsistent with Rouse's recollection that he had spent the afternoon with him. Cross-examination of one of Rouse's alibi witnesses, Christopher Taylor, revealed that he had spoken to detectives while high on PCP, although he was so affected that he did not even remember talking to them. 11/21/85 Tr. at 16-22 (A8913-A8919), see A999 (Taylor stating the same to investigators and denying being at the crime scene). The detectives later testified that Taylor had indicated that he had witnessed the assault. Pet. App. 10a.

4. After a short rebuttal case by the government, the parties moved to closing arguments. As the lead prosecutor would later tell a reporter, he thought that "everything sort of fell" the prosecution's way. A1751. Because the defendants had not presented an overarching, unified defense, the prosecution was able to dismiss as "smokescreen[s]" in its closing both the lack of physical evidence inculpating petitioners and Freeman's failure to

identify Harris as one of the two men in the alley. J.A. 184-185, 211-212.

As affirmative evidence of guilt, the prosecution focused on the testimony of its witnesses. The lead prosecutor conceded their weakness, stating as follows: "It would have been better if there had been no deals made, no bargains. * * * It would have been better if there were no drugs involved. It would have been better if nobody had ever lied about anything." J.A. 238-239. But, he noted, the defendants were asking the jury to believe some of the same witnesses. He mockingly paraphrased "the ten arguments" as follows: " 'The believable witnesses are the witnesses who didn't say my client was there. The unbelievable witnesses are the witnesses who say my client was there.' " J.A. 185.

In his final minutes before the jury, the lead prosecutor assured that, "[a]fter an exhaustive and intense police investigation, the only witnesses who came forward or were brought forward [or] were found, you have heard from." J.A. 239. As to those witnesses, he stated, the jury should put aside the inconsistencies in their testimony and rely on their demeanor. "Think about when Harry Bennett cried," he asked the jury. J.A. 242. "Think about those tears. Think about that face. Think about those emotions." *Ibid.* He invited the jury to do the same with Alston: "Think about Calvin Alston and * * * how he got all torn up when he started thinking about that moment." *Ibid.*

5. The jury deliberated for seven days. It eventually returned a mixed verdict, acquitting Harris and Ruffin, but convicting five of the petitioners and Webb, who were each convicted of two counts of first-degree felony murder and one count each of kidnapping and armed robbery under D.C. Code §§ 22-2101, 22-2401, 22-2901, and 22-3202

(1981 & 1987 Supp.). The jury reported that it was deadlocked as to Christopher Turner and Overton. After two more days of deliberations, and numerous votes, the jury convicted them of the same charges. Pet. App. 10a-11a.

The acquittals of Harris and Ruffin were notable in light of the prosecution's reliance on Alston's and Bennett's testimony. Both Alston and Bennett had inculpated Harris; Alston even testified that Harris made a grotesque comment during the sexual assault. J.A. 155, 161. And Bennett testified that Ruffin was given one of Mrs. Fuller's rings in the garage and had gathered her jewelry from the floor in the alley as Mrs. Fuller was being beaten. A400, A406. The jury nevertheless voted to acquit both Harris and Ruffin.

6. Although the District of Columbia Court of Appeals vacated two charges for each petitioner in light of merger issues arising out of the felony-murder charges, the court otherwise affirmed petitioners' convictions in two decisions. *Catlett* v. *United States*, 545 A.2d 1202 (D.C. 1988); *Turner* v. *United States*, Nos. 86-314 & 90-530, Mem. Op. & J. (D.C. Jan. 24, 1992).

D. The Disclosure Of *Brady* Information And Petitioners' Post-Conviction Proceedings

Petitioners have consistently maintained their innocence for more than three decades. Many years after their trial, a Washington Post reporter brought to light flaws in the prosecution case. See, *e.g.*, Patrice Gaines, *A Case of Conviction*, Wash. Post, May 6, 2001, at F1. Eventually, all but one of the living purported eyewitnesses gave statements recanting their testimony. Based on that information, in 2010, petitioners filed motions to vacate their convictions or alternatively to receive new trials in the Superior Court of the District of Columbia under D.C. Code § 23-110 (2012 Repl.) based on claims that their due

process rights had been violated under *Brady* and that they were actually innocent and thus entitled to relief under the District of Columbia's Innocence Protection Act, D.C. Code § 22-4135 (2012 Repl.).[3]

1. Petitioners uncovered the following exculpatory evidence that had been suppressed at trial.

a. Through documents first obtained by the Washington Post, petitioners discovered suppressed evidence of an alternative perpetrator named James Blue. Specifically, in October 1984, a woman named Ammie Davis gave a statement to the police stating she had witnessed Blue murdering Mrs. Fuller. J.A. 56-58. Blue had served time in jail for assault, and had arrests for rape and forcible sodomy. Pet. App. 19a. Davis stated that, on the day of the murder, she saw Blue grab a woman and "pull her into the alley," and that he beat the "f[***] out of her" and "killed her for just a few dollars." J.A. 56-57.

Investigators took no action with regard to Davis's statement until August 1985, at which time the lead prosecutor interviewed Davis. Pet. App. 20a. Although the lead prosecutor conceded that Davis knew details of the crime, he did not believe her account, in part because Davis had previously implicated Blue in another murder, and in part because he was confident in his existing theory that the crime had been committed by a large group. *Id.* at 21a. Shortly before petitioners' trial, on October 9, 1985, Blue murdered Davis. Blue pleaded guilty to Davis's murder and died in prison in 1993. *Id.* at 22a & n.17.

b. Petitioners moved to compel discovery from the government regarding its files from the original crime.

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[3] Yarborough also sought relief for violation of his right to effective assistance of counsel, the denial of which he does not contest in this Court.

More than two months after petitioners' motion, the government notified petitioners that it would produce documents including notes made by the lead prosecutor about the case and the police department's master file. Apart from Davis's statement, the exculpatory and impeachment information that forms the basis of petitioners' claims comes from these files.

i. The lead prosecutor's notes revealed information linking a felon with a history of assaulting women to the crime scene. Although Freeman only ever referred to the two men in the alley as the "two dudes," he had identified them to police out of a photo album used by the detectives when interviewing witnesses. Accordingly, the prosecution knew that the two individuals Freeman saw were James McMillan and Gerald Merkerson. J.A. 24. As a result, McMillan was considered a suspect. J.A. 279. McMillan at first refused to talk to the prosecutor or detectives about the case. J.A. 27-28. Although it is possible that McMillan later spoke with investigators, there is no record of what he said. J.A. 279-280.

Witness statements by Speed and Tylie, two individuals who had waited with Freeman for the police, also identified McMillan as one of the two men in the alley. J.A. 26-27.[4] They both knew McMillan; in fact, Speed was dating him. J.A. 27. According to the lead prosecutor's notes, Speed saw that McMillan had "something under his coat" and thought he was "acting suspiciously." J.A. 28.[5]

Shortly after Mrs. Fuller's murder, McMillan was arrested for robbing and assaulting two other middle-aged

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[4] A fourth witness, Clayton Coleman, also told police about the two men but could not identify them by name. J.A. 23.

[5] Speed also thought that McMillan's companion, Merkerson, was putting something under his shirt, which she thought were papers. J.A. 27.

women in the same neighborhood. On October 24, 1984, McMillan attacked D.C. councilwoman Nadine Winter in an alley behind the 1100 block of K Street Northeast. The next day, he was one of two people who attacked 52-year-old Marilyn Ludwig on the 600 block of 12th Street Northeast. McMillan was arrested that day, later convicted, and sentenced to eight to twenty-five years for the assaults. Pet. App. 17a-18a & n.12.

McMillan served approximately eight years in jail for those crimes. About two months following his release, in 1992, McMillan, acting alone, forcibly sodomized and beat to death a woman in an alley three blocks from where Mrs. Fuller had been found. Pet. App. 18a-19a. The similarities between the crimes are striking. Like Mrs. Fuller, McMillan's 1992 victim was "dragged * * * through the alley" and found naked from the waist down with her sweater "pushed up." Gov't C.A. Br. 53. McMillan's victim and Mrs. Fuller both died from blunt-force trauma to the head and torso, and were subjected to "traumatic anal sodomization resulting in severe internal injuries." Pet. App. 19a. McMillan was sentenced to life without parole for this murder and remains incarcerated. *Ibid.*

ii. The prosecutor's notes and the police file also revealed that a group, including Willie Luchie, Jackie Watts, and Ronald Murphy, had been in the alley at approximately 5:30 p.m. on October 1. Pet. App. 16a. Based on statements from Luchie and Murphy, it is apparent that they did not see any group in the alley. J.A. 25, 27, 53-55. Even more significantly, at least Luchie and Watts heard "several groans" coming from the garage, and Luchie looked at the garage and observed that both doors were closed. J.A. 25, 27. As the lead prosecutor would later concede, only "one or a very few assailants" could have been in the garage with Mrs. Fuller if the doors were closed. Pet. App. 16a.

iii. Finally, the prosecutor's notes contained evidence further impeaching the testimony of various prosecution witnesses. Specifically, the notes revealed evidence that:

- Eleby was high on PCP while she met with investigators and identified photographs and suspects. Pet. App. 23a; see A1004.
- Eleby had asked her friend, Porter, to lie to police when Porter accompanied Eleby to her first meeting with investigators. Porter did as Eleby asked, falsely telling police that she heard Alston's purported confession to Eleby. J.A. 25-26; Pet. App. 22a.
- Jacobs only told investigators she had seen the crime after one of the detectives, in the presence of the lead prosecutor, "started to question her hard." A1009. This involved the detective pulling his chair close to hers, and touching and talking to the fourteen-year-old runaway "like a father," only then to pound the table and yell at her when she denied knowledge. A2476-A2480. After telling the investigators she was there, she immediately "tried to back out" of what she had said, and "vacil[l]ated back and forth" in subsequent meetings with prosecutors. A1009.
- Investigators had sought to corroborate Thomas's testimony by speaking with his aunt, whom Thomas had said he had talked to immediately after witnessing the crime. She did "not recall [Thomas] ever telling her anything such as th[at]." A1006.

2. At the post-conviction hearing, petitioners called Harris's trial counsel, Michele Roberts, who was widely

regarded as one of Washington's best trial lawyers. See Kim Eisler, *Need a Good Lawyer?*, Washingtonian Mag. (Apr. 1, 2002). Ms. Roberts testified that she was not aware of the withheld alternative-perpetrator or impeachment information described above, and that she would have found the evidence helpful to the defense. A2254-A2272. She explained that the evidence pointing to alternative perpetrators would have enabled her to "present evidence offering a counter narrative * * * that would have been particularly helpful, especially given how the community at large and presumably the jury as well emotionally responded" to the crime. A2255.

Petitioners supported the suppressed evidence with expert testimony from a state chief medical examiner and a violent-crime-scene expert who worked for a state police department for 26 years.[6] Both testified that within a "reasonable degree" of certainty, the crime was more likely committed by one to three people than the large group portrayed by the prosecution. See A2132-A2133, A2142, A2229, A2238-A2239.

The medical examiner and crime-scene expert had several grounds for their conclusions. *First*, Mrs. Fuller was found in an undisturbed pool of blood, and no blood was found elsewhere. A2233-2234. The crime-scene expert explained that this showed that Mrs. Fuller was sexually assaulted where her body was found. A2237. The government subsequently conceded that point. A2603. *Second*, both experts explained that the injuries Mrs. Fuller sustained from the beating were localized to her head and right torso, whereas group attacks usually present injuries across a greater portion of a victim's body.

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[6] In 2015, the medical examiner lost his position and pleaded no contest to charges that he used his state office for private gain because he had used state resources in his private consulting business.

A2142, A2244. And, *third*, the crime-scene expert found the pattern of Mrs. Fuller's clothes significant: a group likely would have pulled at, torn, and scattered Mrs. Fuller's clothes in a "frenzy," but Mrs. Fuller's clothes were undamaged and many were near her body. A2239, A2247.

The expert witnesses also explained how the purported eyewitnesses had given accounts flatly inconsistent with the objective crime-scene evidence. Alston said in his statement, for example, that Mrs. Fuller had been struck by a 2x4 in the back of the head. A1154. But there were no injuries to the back of her head, let alone injuries consistent with being struck by a 2x4. A2134, A2146. Bennett testified in the grand jury that someone punched Mrs. Fuller in the chin so hard that she lost consciousness. A1872. But Mrs. Fuller had no injuries consistent with having been punched in the chin. A2146-A2148. And three of the four purported eyewitnesses to the sexual assault—Alston, Bennett, and Eleby—testified at trial that Mrs. Fuller's legs were held down. A410-411, A497-498, A553-554.[7] Yet the objective medical evidence showed no restraint marks on her legs or elsewhere. A2240-A2242.

Finally, the medical examiner compared the medical evidence surrounding McMillan's 1992 murder to Mrs. Fuller's murder, noting that both victims had injuries from the sodomy that were "similar," "unusual," and "rare." A2179-A2180.

3. All but one of the living purported eyewitnesses—Alston, Bennett, Jacobs, and Montgomery—took the stand. Pet. App. 12a-16a. Alston and Bennett recanted their testimony, stating that they had felt compelled to

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[7] The fourth, Jacobs, said that she did not recall one way or the other. A1968.

give statements by the detectives' heavy-handed interrogation techniques, and that the detectives had suggested information to them. Bennett further testified, implausibly, that he once said into the camera that he was lying, which was then recorded over. *Id.* at 13a. Yarborough also took the stand to recant the contents of his videotaped statement.[8] *Id.* at 65a-67a. The government responded by calling the two lead detectives, both of whom denied giving the witnesses information but admitted to applying pressure to the witnesses. *Id.* at 14a-15a & n.11.

Jacobs and Montgomery also testified. Jacobs asserted that her trial testimony had been false because she had not been in the alley when the crime occurred. Pet. App. 15a. She nevertheless "broke down emotionally" when asked to explain how Mrs. Fuller's murder made her feel. *Id.* at 16a. And although Montgomery had previously signed an affidavit recanting his testimony, he took the stand and denied committing perjury in the original trial. *Id.* at 15a.[9]

4. The Superior Court denied petitioners' motions. Pet. App. 81a-131a. It did not find the recantations credible. *Id.* at 110a. It held that the alternative-perpetrator evidence was not material because a jury either would have not credited it or would have assumed that the alternative perpetrators had simply been additional participants in the group attack. *Id.* at 123a. It did not address

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[8] Yarborough further testified that one of the detectives knocked him out of his chair and shoved him into a file cabinet, injuring his knee. While Yarborough was indeed sent to the hospital that evening for a knee injury, he stated on the videotape that he had been injured playing basketball. The detectives denied Yarborough's claims. Pet. App. 15a.

[9] Montgomery had only seven months left on a ninety-eight-month drug sentence when he testified. J.A. 254.

the testimony regarding the witnesses in the alley. Finally, the court reasoned that the impeachment evidence was not material because the prosecution's witnesses had already been heavily impeached on other grounds. *Id.* at 124a-127a & nn.23-24.

5. The District of Columbia Court of Appeals affirmed. Pet. App. 1a-78a.

With regard to petitioners' *Brady* claims, the court concluded that the evidence regarding McMillan; Davis's statement implicating Blue and the police's mishandling of it; the statements from the witnesses in the alley; and the additional impeachment evidence (except for the evidence regarding Jacobs's interactions with investigators) had been suppressed and were favorable to the defense. Pet. App. 48a; see *id.* at 22a n.18.[10]

The D.C. Court of Appeals concluded that McMillan's October 1984 assaults could have been used at trial to present an alternative-perpetrator defense under *Winfield* v. *United States*, 676 A.2d 1 (D.C. 1996) (en banc). Pet. App. 33a-36a. The court decided, however, that it could not consider the 1992 murder in evaluating the materiality of the suppressed evidence regarding McMillan because the murder occurred after the trial in this case. *Id.* at 36a-37a.

As to the group in the alley at 5:30 p.m., the court again acknowledged that the evidence was helpful to the defense. Nevertheless, it concluded the evidence was not material, noting that a jury probably would have expected there to be "more noise" if the attack was ongoing and

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[10] The court of appeals rejected petitioners' arguments that the prosecution withheld additional categories of evidence impeaching Eleby and Alston. See *id.* at 22a n.18, 23a. Petitioners are not challenging those determinations.

would have thought Luchie was mistaken about seeing the doors to the garage closed. Pet. App. 32a.

The D.C. Court of Appeals also held that Davis's statement implicating Blue was inadmissible hearsay. Although it conceded the statement was admissible for the purpose of criticizing the thoroughness of the government's investigation, it concluded that the statement's "impact would have been negligible." Pet. App. 42a-44a. The court similarly reasoned that the suppressed impeachment evidence would have had little impact with the jury. *Id.* at 45a.

The court then sought to consider the evidence as a whole. Pet. App. 48a-53a. While acknowledging that the prosecution witnesses "contradicted themselves and each other," the court reasoned that the jury ultimately had found "the government's witnesses credible." *Id.* at 49a-50a. It further reasoned that, because the suppressed evidence challenged "the basic structure of how the crime occurred," "the burden on appellants to show materiality [was] quite difficult." *Id.* at 54a. The court asserted that petitioners bore the burden of showing "a reasonable probability" that the jury would have "doubt[ed] *virtually everything*" offered by the prosecution's purported eyewitnesses. *Ibid.* Applying that standard, the court affirmed the denial of relief under *Brady*. *Id.* at 78a.[11]

6. The D.C. Court of Appeals subsequently denied petitioners' motion for rehearing. Pet. App. 79a-80a.

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[11] The court further affirmed the denial of petitioners' actual-innocence claim on the grounds that the Superior Court had not found the recantations credible and that McMillan's 1992 sodomy murder did not prove he murdered Mrs. Fuller without the involvement of petitioners. Pet. App. 56a-62a. Petitioners are not challenging that conclusion in this Court.

SUMMARY OF ARGUMENT

This case involves the application of the Court's well-established standard for determining whether suppressed evidence was material to a criminal defendant's guilt or punishment, such that the suppression of that evidence would violate the defendant's due process rights under *Brady* v. *Maryland*, 373 U.S. 83 (1963). That standard asks simply whether there is a reasonable probability that the suppressed evidence, considered collectively, would have affected the outcome. *E.g.*, *Kyles* v. *Whitley*, 514 U.S. 419, 433-437 (1995).

The suppressed evidence in this case is of a type and importance that is rarely seen in criminal trials. There is accordingly not just a reasonable probability, but a profound likelihood, that the suppressed evidence would have affected the jury's verdict.

The analysis of the suppressed evidence begins with one of the most useful types of evidence that exists for a criminal defendant: evidence that someone else committed the crime. Numerous witnesses told police that another man, James McMillan, had been seen acting suspiciously at the crime scene. By the time of petitioners' trial, McMillan had pleaded guilty to assaulting and robbing two middle-aged women in the same neighborhood shortly after Mrs. Fuller was attacked. To state the obvious, that information would have been exceedingly useful evidence to petitioners, who were on trial for a murder that the prosecution claimed began as an assault and robbery of a middle-aged woman.

What is more, the prosecution further suppressed evidence indicating that the crime was committed by one or two people, rather than by a large group. Consistent with McMillan's having committed the murder, but not with petitioners' having done so, a group of witnesses walked by the garage at the estimated time of death and did not

see any evidence that a group was present. Instead, they heard groans coming from the garage where Mrs. Fuller's body was found. Critically, one witness saw that both garage doors were closed. Because one of the doors was open when Mrs. Fuller's body was discovered, that witness's testimony would have given rise to a strong inference that the killer was inside the garage at the time with Mrs. Fuller.

The evidence implicating McMillan would have created an alternative theory of the crime, which would have been supported by the statements from the witnesses in the alley indicating that Mrs. Fuller was killed by one or two people. If this suppressed evidence had been available to petitioners, who would have further corroborated it with the objective crime-scene evidence, it surely would have given rise to reasonable doubt on the part of the jury. At a minimum, there is unquestionably a "reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Smith* v. *Cain*, 132 S. Ct. 627, 630 (2012) (quoting *Cone* v. *Bell*, 556 U.S. 449, 469-470 (2009)).

To be sure, the prosecution presented at trial purported eyewitness accounts, including the testimony of two individuals who pleaded guilty to lesser charges in exchange for their testimony. But the testimony of those witnesses and others were so riddled with inconsistencies that, even without hearing petitioners' alternative account of the crime, the jury still acquitted two defendants and initially deadlocked as to Overton and Christopher Turner.

The jury's confidence in the prosecution's investigation and its witnesses would have been further eroded by two additional categories of suppressed evidence. First, the prosecution withheld the police department's mishan-

dling of a potential lead on another alternative perpetrator. That mishandling would have called into question the effectiveness of the police investigation, especially given the problematic testimony upon which the prosecution relied. Second, the prosecution suppressed additional impeachment information that would have caused the jury to question the validity of the testimony of many of the purported eyewitnesses.

The obvious materiality of the withheld evidence is further underscored by McMillan's subsequent commission of a strikingly similar crime. That crime further confirms that petitioners could have developed evidence implicating McMillan in Mrs. Fuller's murder. At a minimum, in evaluating the justice of petitioners' convictions, the Court should take into account the similarities between the crimes.

ARGUMENT

THE FAILURE OF THE PROSECUTION TO DISCLOSE EXCULPATORY AND IMPEACHMENT INFORMATION VIOLATED PETITIONERS' RIGHTS TO DUE PROCESS BECAUSE THE INFORMATION WAS MATERIAL TO THE ISSUE OF GUILT

A. Due Process Requires The Prosecution To Disclose All Favorable Information Material To The Defense

1. Our criminal justice system places "trust in the prosecutor as 'the representative of a sovereignty whose interest in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" *Kyles*, 514 U.S. at 439 (alterations omitted) (quoting *Berger* v. *United States*, 295 U.S. 78, 88 (1935)). "It is as much his duty to refrain from improper methods * * * as it is to use every legitimate means to bring about a just [conviction]." *Berger*, 295 U.S. at 88.

Part of the prosecutor's "special role * * * in the search for truth in criminal trials" involves "a limited departure from a pure adversary model." *Strickler* v. *Greene*, 527 U.S. 263, 281 (1999); *United States* v. *Bagley*, 473 U.S. 667, 675 n.6 (1985). Under the familiar principle of *Brady* v. *Maryland*, 373 U.S. 83 (1963), the prosecutor must provide to the defense evidence that is favorable and material to the defendant's guilt or punishment, "regardless of request" by the defense. *Kyles*, 514 U.S. at 432-433. Any failure to do so, "irrespective of the good faith or bad faith of the prosecution," "violates due process." *Brady*, 373 U.S. at 87.

The Court has previously observed that a claim based on a violation of a defendant's due process rights under *Brady* has three elements. The first is that the evidence is "favorable to the accused, either because it is exculpatory, or because it is impeaching." *Strickler*, 527 U.S. at 281-282. This element is not a demanding one; so long as the evidence has the capacity, in the context of the trial, to "work against the State, not for it," the evidence will satisfy this first element. *Kyles*, 514 U.S. at 451.

Second, "the evidence must have been suppressed" by the government. *Banks* v. *Dretke*, 540 U.S. 688, 691 (2004) (internal quotation marks omitted). For *Brady* purposes, "suppression occurs when the government fails to turn over even evidence that is known only to police investigators and not to the prosecutor." *Youngblood* v. *West Virginia*, 547 U.S. 867, 869-870 (2006) (per curiam).

The third element is that the favorable, suppressed evidence must be "material." *E.g.*, *Kyles*, 514 U.S. at 433-434. And evidence is material for purposes of *Brady* when "there is 'any reasonable likelihood' it could have 'affected the judgment of the jury.'" *Wearry* v. *Cain*, 136 S. Ct. 1002, 1006 (2016) (per curiam) (quoting *Giglio* v. *United*

States, 405 U.S. 150, 154 (1972) (quoting *Napue* v. *Illinois*, 360 U.S. 264, 271 (1959))).

2. This case, like the Court's other most recent cases involving *Brady*, turns on the issue of materiality. See, *e.g.*, *Wearry*, 132 S. Ct. at 1006; *Smith*, 132 S. Ct. at 630. Materiality does not require that the defendant "would more likely than not have received a different verdict with the evidence." *Kyles*, 514 U.S. at 434. Rather, the Court need only find that "the likelihood of a different result is great enough to 'undermine confidence in the outcome of the trial.'" *Smith*, 132 S. Ct. at 630 (alteration omitted) (quoting *Kyles*, 514 U.S. at 434). And, because *Brady* applies exclusively to criminal trials, "a different result" means only the jury retaining reasonable doubt—that is, not reaching a subjective state of near certitude of guilt. *Victor* v. *Nebraska*, 511 U.S. 1, 15 (1994); see *In re Winship*, 397 U.S. 358, 363 (1970) (noting reasonable-doubt standard "is a prime instrument for reducing the risk of convictions resting on factual error").

In crafting the materiality standard, the Court has been cautious "to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations." *Kyles*, 514 U.S. at 440. For a court to conclude that withheld evidence is not material, the question is not whether a jury "*could* have disbelieved" the withheld evidence; a court must instead have "confidence that it *would* have done so." *Smith*, 132 S. Ct. at 630.

Finally, a court considers the suppressed evidence "collectively, not item by item." *Kyles*, 514 U.S. at 436-437. And it evaluates that evidence "in the context of the entire record"—that is, "the existing or potential evidentiary record." *United States* v. *Agurs*, 427 U.S. 97, 112 (1976); *Kyles*, 514 U.S. at 439. Accordingly, "additional

evidence of relatively minor importance" can be material in comparatively weak cases. *Agurs*, 427 U.S. at 113.

3. In recent years, the Court has twice reversed state court judgments that have misapplied the *Brady* materiality standard. See *Wearry*, 136 S. Ct. 1002; *Smith*, 132 S. Ct. 627.

In *Smith*, the Court considered the case of a man convicted of a group murder on the strength of an eyewitness identification. After trial, defense counsel found police notes indicating that on the day of the murder that eyewitness told an officer that he could not identify any of the perpetrators. However, notes made by other officers that evening indicated that the witness could not identify any of the perpetrators *except for one*—the lead perpetrator who had not been wearing a mask—whom he later identified as the defendant. See 132 S. Ct. at 629-630. After looking at 14 photo arrays over many months, the eyewitness never made an identification until the day he was shown a picture of the defendant, at which point he said, "This is it. I'll never forget that face." *Id.* at 632 (Thomas, J., dissenting). Nevertheless, the Court refused to "speculate about" which of the competing factual propositions a jury would have endorsed, and deemed the suppressed evidence material. *Id.* at 630 (opinion of the Court).

In *Wearry*, the Court summarily reversed a state court's application of *Brady* based on withheld impeachment evidence. There, the state withheld evidence that a main prosecution witness had testified because he held a grudge against the defendant, that the same witness had given testimony that was contradicted in part by disputed medical evidence, and that another witness had sought a deal to shorten his sentence in exchange for testimony. See 136 S. Ct. at 1004-1005. The state could nevertheless point to untainted witnesses who testified that the defendant had been driving the victim's car, which had blood on

it, and that the defendant had sought to sell them personal items belonging to the victim. See *id.* at 1010-1011 (Alito, J., dissenting). Nevertheless, the Court admonished the state court for having "emphasized reasons a juror might disregard new evidence while ignoring reasons she might not," and reversed. *Id.* at 1006-1007 (opinion of the Court).

This case presents the same types of errors the Court identified in *Smith* and *Wearry*. The D.C. Court of Appeals repeatedly focused on reasons why a jury could have disregarded the suppressed evidence. And, it engaged in those inferences despite petitioners' presenting highly exculpatory evidence on the basis of which a jury could well have found reasonable doubt. The court of appeals' rejection of petitioners' *Brady* claims was erroneous, and its judgment should therefore be reversed.

B. The Prosecution Suppressed Favorable Information Material To Petitioners' Defense

1. The Prosecution Suppressed Evidence Indicating That Someone Else Committed The Murder

It is hard to conceive of more quintessentially exculpatory evidence than evidence that someone else committed the crime. See, *e.g.*, *Kyles*, 514 U.S. at 429. In this case, the prosecution withheld evidence that James McMillan, a serial assaulter of women like the victim, had been seen acting suspiciously at the crime scene.

a. McMillan would have been a compelling suspect if petitioners had evidence linking him to the crime scene. He lived "three doors down from the alley" on Eighth Street. Pet. App. 17a. And, by the time of petitioners' trial, McMillan was serving a lengthy prison sentence for violent assaults of middle-aged woman whom he assaulted "in the same neighborhood in the span of less than a month" after Mrs. Fuller's death. *Id.* at 36a.

Those assaults were not standard purse snatchings. In one attack, he broke the victim's nose. In the other, although his assault was interrupted by two painters who chased him away, his attack was so violent that the victim (a D.C. councilwoman) yelled "murder" and "didn't realize at first that he was trying to snatch [her] purse." Marcia Slocum Greene & Alfred E. Lewis, *Councilwoman Winter Mugged, She Suffers Minor Injuries in Street Robbery*, Wash. Post, Oct. 25, 1984, at C1. McMillan "punched [her] in the face and kept beating and beating [her] * * * * and knocked [her to] the ground." *Ibid.*

b. Not only was McMillan observed at the crime scene, but his behavior there was self-evidently suspicious. According to Freeman, McMillan and his confederate had been acting suspiciously throughout the day, which they spent walking "up and down H street." A237, A1357. Then, shortly after Freeman discovered Mrs. Fuller's body, the two men ran into the alley only to suddenly stop "at the corner by the garage." A215, A1357. Neither man spoke to Freeman or inquired about why he was standing by the garage. Instead, they just "look[ed] around" for "about five minutes," while McMillan held something under his coat. A1357. Even McMillan's girlfriend told police he was "acting suspiciously." J.A. 28. In fact, McMillan's behavior was so strange that she "started to call out to" him but neither said anything. J.A. 26. When the police arrived, one of the two men told the other not to run, but they ran anyway. A1357.

A jury would have seen this behavior as strongly tending to inculpate McMillan. Indeed, it may well have surmised that McMillan had the object used to assault Mrs. Fuller under his jacket. The government would not have been able to directly contest those inferences, as detectives had put Harris in a lineup in the hope that Freeman

would identify him as one of the two men Freeman had seen.

c. The D.C. Court of Appeals hypothesized that the jury may have concluded that McMillan was just another member of the large group of perpetrators identified by the government witnesses. Pet. App. 51a. A court's ability to craft such outcomes does not render the McMillan evidence any less material. See *Smith*, 132 S. Ct. at 630. In any event, it would have been odd for the jury to reach such a conclusion. After all, Freeman, Tylie, and Speed did not see McMillan at the garage with one or more of the defendants. And McMillan attacked Councilwoman Winter by himself and attacked Ms. Ludwig with one other person. There is no valid reason to assume that the jury would have concluded that McMillan participated in a group assault on this occasion when he had not done so in committing other, similar crimes.

2. The Prosecution Suppressed Witness Statements Indicating Mrs. Fuller Was Killed By One Or Two People

The prosecution further withheld highly exculpatory evidence indicating that the prosecution's group-attack theory was false.

a. At petitioners' trial, they were not aware that a group of at least four people walked through the alley at approximately 5:30 p.m., which is Mrs. Fuller's estimated time of death. A712. The statements taken from two members of this group indicate that at least Luchie and Watts heard groans coming from the garage, which the D.C. Court of Appeals acknowledged "undoubtedly" belonged to Mrs. Fuller. J.A. 25, 27, 53-54; Pet. App 50a. A jury would readily infer that Mrs. Fuller was therefore not only alive, but conscious, in the garage as these witnesses walked through the alley.

The natural inference from these statements is that the group heard Mrs. Fuller being attacked. Because petitioners did not see any group present in the alley, these statements directly suggest that Mrs. Fuller was not killed by a group.

That inference is strongly reinforced by Luchie's statement that, in response to hearing the groans, he looked at the garage and observed that both doors were closed. J.A. 25. As the lead prosecutor conceded during the post-conviction proceedings, it would have been impossible for a large group to have been in the garage with Mrs. Fuller with the doors closed. Pet. App. 16a. Moreover, the uncontradicted evidence is that, when Freeman came upon the garage approximately a half-hour later, one of the doors was open—suggesting that Mrs. Fuller's one or two assailants were in the garage with her when Luchie passed by the garage. Pet. App. 4a, 32a.

b. The D.C. Court of Appeals sought to minimize this evidence, but its efforts to do so were circular. The court determined that "the fact that Watts and Luchie heard nothing else and saw no signs of any activity more likely indicated that the assault was over and that the assailants were gone." Pet. App. 50a. But that depends on the assumption that Mrs. Fuller died from a group attack. Absent that assumption, what Watts and Luchie heard is completely consistent with an assault having been in progress, especially one that followed the victim having been beaten.

As to Luchie's seeing both doors closed, the court ventured the hypothesis that the jury would have concluded that Luchie was mistaken, or that someone else peeked in the garage and left the door open between Luchie's observation at 5:30 and Freeman's arrival at 6:00. Pet. App. 50a. A prosecutor could offer those rationales to a jury,

but there is little reason a jury would believe them, especially given the evidence the jury would have heard regarding McMillan.

3. *The Suppressed Evidence Regarding A Different Perpetrator And From Witnesses Who Had Been In The Alley Supports An Alternative Theory Of The Crime*

As is often the case with suppressed, favorable information, the preceding categories of evidence "would not have functioned as mere isolated bits of good luck" for petitioners. *Kyles*, 514 U.S. at 449 n.19. Petitioners would have used McMillan's background and suspicious behavior at the crime scene to argue he was the real perpetrator. And that alternative theory would have been buttressed by the observations from the witnesses who had been in the alley at the estimated time of death. That is, petitioners would have told the jury that McMillan, perhaps with an accomplice, killed Mrs. Fuller and that he was in the garage completing the crime when Luchie heard groans emanate from the garage and saw the doors were closed.

The strength of the inference that McMillan was the real killer is underscored by the D.C. Court of Appeals' attempt to minimize it. In an effort to reconcile both the Luchie evidence and the evidence of McMillan's suspicious behavior with the prosecution theory of a group assault, the court invented a scenario in which McMillan happened upon the garage and decided to look in during the half-hour window between when Luchie and Murphy left the alley and Freeman arrived. Pet. App. 51a. But that attempt at reconciliation does not work, because it does not explain why McMillan would anxiously return to the garage and stand around suspiciously after. The court sought to answer that in a footnote, contending that it would "explain[] his suspicious behavior" if McMillan

"heard about the attack and decided to look in out of curiosity" only to then further decide to "carr[y] away something from the garage." *Id.* at 51a n.81. That a court would discuss such peculiar possibilities itself shows the inferential force of petitioners' alternative theory.

a. What is more, an important portion of the evidentiary record—the objective crime-scene evidence—is consistent with McMillan's guilt and petitioners' innocence. See *Kyles*, 514 U.S. at 439; *Agurs*, 427 U.S. at 112. The unrebutted testimony from two experts supports the proposition that Mrs. Fuller was killed by one to three people. They based this opinion on evidence such as the nature and distribution of Mrs. Fuller's injuries and the condition of her clothes. See pp. 22-23, *supra*.

Most importantly, the forensic evidence indicates, and the government has now conceded, that Mrs. Fuller was sexually assaulted where her body was found, in a cramped corner of the garage, with her body at most a foot from the garage door and perhaps two feet from the side of the garage with an upright shoeshine box near her head. J.A. 30; see pp. 3-4, *supra*.

The location itself suggests that only one or two people were involved in the sexual assault. The prosecution theory at trial was that one person committed the sodomy while two defendants held Mrs. Fuller's legs, and five other defendants were close to her body. J.A. 155. But there was simply no room for three people, much less eight, where her body was found. It is no surprise, therefore, that the lead prosecutor told the jury that Mrs. Fuller's body was moved to the corner of the garage after the assault. J.A. 156. Not only was that the only way to make sense of a group attack in light of the crime scene,

but Alston, Bennett, and Eleby gave testimony inconsistent with the sexual assault occurring where the body was found. A508, A550-553, A1090-1091.[12]

In evaluating materiality, this Court has held that "considerable forensic and other physical evidence linking petitioner to the crime" suggests that withheld evidence will not be material. *Strickler*, 527 U.S. at 293; see *Wood* v. *Bartholomew*, 516 U.S. 1, 3 (1995) (per curiam). In *Strickler*, for example, hair recovered from the crime scene and fingerprints recovered from the victim's car matched the defendant's, and even the "character of the fatal injuries to the victim" strongly supported the jury's verdict. 527 U.S. at 293 & n.41.

Conversely, a *lack* of forensic evidence indicates that withheld evidence is *more* likely to be material. See, *e.g.*, *Banks*, 540 U.S. at 701. Here, moreover, the Court is not

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[12] The court of appeals suggested that petitioners could have used the physical evidence to mount a theory that Bennett and Alston committed the murder together. Pet. App. 52a n.82. That does not diminish the support the objective crime-scene evidence provides for the alternative theory that McMillan committed the murder; the crime-scene evidence is part of the record against which the withheld evidence is measured. *Agurs*, 427 U.S. at 112. In any event, the notion that Bennett and Alston committed the murder alone would have been implausible, as neither had criminal histories of assault and indeed neither even knew the other at the time of the murder. A1566 (Bennett); Joint Hr'g Ex. 76 (Alston); 11/5/85 Afternoon Tr. at 140-141 (A5943-A5944). Nor would a theory that Bennett and Alston committed the murder alone have made sense of the objective crime-scene evidence, as both gave testimony that is thoroughly inconsistent with it. It is therefore telling that only one petitioner's trial counsel attempted such an argument in front of the jury, floating the idea in closing that Bennett and Alston committed the crime and that Alston conspired with Eleby and Jacobs to frame others in advance of Eleby's speaking with detectives. J.A. 173-179.

simply confronting a lack of inculpatory physical evidence; the objective crime-scene evidence actually *supports* the materiality of the withheld evidence.

b. i. At base, a trial with the suppressed evidence would have consisted of two competing theories of how Mrs. Fuller was killed. The prosecution would have presented its case through its purported eyewitnesses, vulnerable young people whose testimony contradicted each other and their own previous statements. The defense would have presented the testimony of Freeman, Speed, Tylie, Luchie, Murphy, and Watts to support the theory that McMillan committed the crime. That testimony would have been supported by McMillan's criminal history and the objective crime-scene evidence.

Although petitioners present a far more coherent theory of the crime, the Court need not so conclude to find the evidence supporting it material. See, *e.g.*, *Smith*, 132 S. Ct. at 630. Instead, the question is only whether there exists a reasonable probability of a different result: *i.e.*, that the alternative theory would have given rise to reasonable doubt. *Ibid.* The answer to that question is surely "yes," especially when petitioners' alternative theory is considered without "emphasiz[ing] reasons a juror might disregard new evidence while ignoring reasons she might not." *Wearry*, 136 S. Ct. at 1007.

ii. Just as was the case in *Smith*, the prosecution theory and petitioners' alternative theory present two propositions that "directly contradict" each other. 132 S. Ct. at 630. The evidence supporting each proposition need not be in equipoise in order to grant relief under *Brady*. In *Smith*, for example, the withheld evidence impeached the trial testimony of the key eyewitness who had implicated the defendant by showing that, on the night of the crime, he had expressed doubt about being able to identify any of his assailants. *Id.* at 629. Not only was there other

evidence from that night indicating that the witness could identify the first assailant (whom he later identified as the defendant), *id.* at 630, but the witness gave confident testimony under cross-examination about his identification, telling the jury, "I picked out the person I seen come in that house that held a gun to my head and under my chin." *Id.* at 634 (Thomas, J., dissenting).

Nevertheless, petitioners' "jury would have been entitled to find" that the alternative theory better explains what happened to Mrs. Fuller. *Kyles*, 514 U.S. at 453. Accordingly, the existence of contradictory propositions, each supported by substantial evidence, itself "undermines confidence" in petitioners' convictions. *Smith*, 132 S. Ct. at 631.

iii. The alternative theory would have fundamentally changed the dynamics of petitioners' trial, even more so than the withheld evidence would have affected the trial in *Kyles*, the Court's other *Brady* case involving suppressed evidence of an alternative perpetrator. In *Kyles*, the prosecution suppressed information that the alleged alternative perpetrator (known as "Beanie") had told police to search Kyles's home and garbage for evidence tying him to the crime, which had resulted in the discovery of the victim's possessions as well as the gun used to commit the murder. See 514 U.S. at 427-428, 447-449. The jury in *Kyles* was well aware of Beanie; Kyles's defense was that Beanie had framed him. See *id.* at 429. In fact, the prosecution's rebuttal was to put Kyles and Beanie next to each other and to have four eyewitnesses identify Kyles, not Beanie, as the perpetrator. See *id.* at 431.[13]

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[13] The other chief category of suppressed information in *Kyles* was evidence impeaching the testimony of two of the four eyewitnesses. See 514 U.S. at 441-444. In this case, the purported eyewitnesses

In petitioners' trial, by contrast, the jury heard neither petitioners' alternative theory nor any other serious alternative-perpetrator theory because the prosecution had suppressed the evidence supporting it: McMillan's presence at the crime scene, the statements of witnesses not seeing a group in the alley, and the closed garage doors at the time of Mrs. Fuller's death. Moreover, the prosecution's suppression of plausible alternative perpetrators gave rise to the "not me, maybe them" defense, in which defense counsel rehabilitated prosecution witnesses who had not identified their clients. See pp. 14-15, *supra*.

Accordingly, petitioners' defense with the suppressed evidence supporting the alternative theory would have borne little resemblance to the defense petitioners presented at their original trial. With the withheld evidence, the jury would have been confronted with a credible, competing theory of the crime, supported by disinterested witnesses and objective crime-scene evidence. Such a defense undoubtedly would have cast "the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435.

c. Suppressed evidence of an alternative perpetrator would create a reasonable probability of a different result in most cases. This case, however, was a close one that, in the prosecutor's own words, "easily could have gone the other way." A1751. The jury in petitioners' trial deliberated for seven days—a significant amount of time even for a murder case. And, when the jury did return verdicts, it initially announced a split verdict with two acquittals, six convictions, and a deadlock as to Christopher Turner and

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were already thoroughly impeached at trial and, in any event, additional impeachment information of many of the witnesses was also withheld. See pp. 46-48, *infra*.

Overton. Pet. App. 10a-11a. The jury would deliberate as to those two defendants for an additional two days, during which they took between 40 to 50 votes before convicting both men.[14] Accordingly, even evidence of minimal importance would satisfy the materiality requirement in this case. *Agurs*, 427 U.S. at 113.

Petitioners' alternative theory far exceeds that low threshold for the reasons given above. It also "would have complemented" the evidence at trial impeaching the prosecution's witnesses, and thus further undermined them in the eyes of the jury. *Kyles*, 514 U.S. at 449 n.19. In petitioners' original trial, the prosecution's theory of how the crime occurred went largely unchallenged. Petitioners' alternative theory would have broadened the factual dispute such that the jury would have considered the foundational question of how Mrs. Fuller was killed. In answering that question, the jury would have considered the objective crime-scene evidence and a plausible alternative account of the crime, both of which contradict the account given by the prosecution witnesses. This would have led the jury to seriously consider that those witnesses had given such confused accounts because they were attempting to describe something that they had not seen.

Jurors at the time would not have been surprised that the "young" and "not very smart" witnesses had decided to tell the detectives what they thought the detectives

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[14] To be sure, in a footnote in its decision on petitioners' direct appeal, the D.C. Court of Appeals stated that the evidence of guilt was "overwhelming." See *Catlett* v. *United States*, 545 A.2d 1202, 1206 n.2 (D.C. 1988); Pet. App. 123a, 129a. As in *Kyles*, however, what matters is the impact of the suppressed evidence—not whether a lower court described the evidence as "overwhelming." See *Kyles* v. *Whitley*, 5 F.3d 806, 807, 816-817 & n.16, 820 (5th Cir. 1993), rev'd, 514 U.S. 419 (1995); *id.* at 859-861 (district court opinion).

wanted to hear. J.A. 193. It was obvious that the prosecution's witnesses had not appreciated what the ramifications would be when they talked to police, either for themselves or for the people they identified. The lead prosecutor has admitted, for example, that Eleby and Jacobs "never took this seriously * * * * [and] it was very hard to get them to see * * * that what they were going to say really affected the lives of people." A1736. Alston thought that he would be "a free man" after giving his statement to police. A1175. And Bennett, who was in a love triangle with his ex-girlfriend, Trina Ward, and Rouse, first told detectives that Ward had participated in the murder only to reverse course after they got back together. 11/6/85 Tr. at 127-129 (A6105-A6107). Given the evidence pointing to McMillan, the jury would have entertained the possibility that the prosecution witnesses had made bad decisions to give false statements to the detectives, resulting in testimony in which speculation cobbled together from the detectives' questions, neighborhood rumors, and press coverage was passed off as first-hand observation.

4. The Prosecution Suppressed Additional Information That Cast Doubt On The Investigation And Impeached Its Witnesses

The jury would have been more willing to discount the prosecution's witnesses if it had learned of two additional categories of suppressed evidence that would have undermined the prosecution's investigation and impeached its witnesses.

a. The first category is Davis's statement inculpating Blue and the police department's subsequent bungling of that statement, which would have given petitioners' counsel "a vigorous argument that the police had been guilty of negligence." *Kyles*, 514 U.S. at 447.

i. Davis identified Blue as the assailant on October 26, 1984. Yet prosecutors and detectives investigating the Fuller murder did not learn of Davis's account until August 1985. Pet. App. 20a. In other words, at least nine months passed between a witness giving the police a potential eyewitness account of the crime and the police doing anything about it.

The jury would not have been impressed with the government's explanation for not investigating Davis's account sooner. Jurors would reasonably expect that a potential eyewitness account of such a high-profile murder would not get "lost in the shuffle." A2308. Even the prosecutor realized that the police had mishandled the Blue lead. As he admitted in the post-conviction hearing, his meeting with the detectives once the Davis report resurfaced had "a certain amount of tension"; the prosecutor was not "very happy that no one had paid attention to the report." A2311.

One would expect the jury to have agreed. In light of the suppressed evidence, and given the impeached testimony of the prosecution's witnesses, the jury would have harbored concerns that other leads had not been pursued. The jury would have wondered what the detectives could have learned if they had investigated Davis's statement. Indeed, the detectives' failure to investigate Blue would have crystalized in the jurors' minds the detectives' failures regarding McMillan, given that McMillan was arrested for assaulting Ms. Ludwig the day before Davis gave her statement.

ii. Davis's statement inculpating Blue would also have contradicted one of the prosecution's principal themes. In his final statement to the jury, the lead prosecutor sought to overcome the challenges to the credibility of the prosecution's witnesses by telling the jury it had heard *all* of

"the witnesses who came forward or were brought forward" through "an exhaustive and intense police investigation." J.A. 239. Yet that omitted Davis, who had come forward with a statement that the police did not act on.

Accordingly, even without the evidence supporting petitioners' alternative account, Davis's statement would have shown the jury that there was more to this case than the prosecution suggested. Especially given the flaws in the testimony from the prosecution's witnesses, the existence of relevant testimony outside those witnesses' accounts would naturally have given the jurors doubts about petitioners' guilt.

b. i. The jurors' doubts would have been exacerbated by additional impeachment evidence that the prosecution withheld regarding the three purported eyewitnesses who had not signed plea agreements with the government—Eleby, Jacobs, and Thomas—as well as another witness, Porter, whose testimony indirectly supported the prosecution's group-attack theory. In particular, the prosecution suppressed evidence of the following:

- Eleby regularly used PCP, and was high when she met with investigators to identify participants in the crime.
- At Eleby's request, Porter lied to investigators and told them that she was in the car with Eleby and Alston when Alston purportedly confessed to Eleby.
- Detectives used unusual techniques during Jacobs's interviews, and Jacobs immediately recanted having seen the crime and continued to vacillate about whether she witnessed the crime.

- The one person Thomas identified who could corroborate his purported eyewitness account, his aunt, told police she could not.

The court of appeals determined that the prosecution suppressed all of that evidence, with the exception of the evidence regarding Jacobs. Pet. App. 22a-23a. As to the Jacobs evidence, the court determined that "the defense knew of Jacobs's denials [of witnessing the crime], because she was asked about [them] on cross-examination." *Id.* at 22a n.18. Although Jacobs was impeached with her initial denials of having witnessed the crime, she was not confronted with the withheld evidence that, immediately after her statement to detectives and on subsequent occasions thereafter, she recanted her statement. Nor did the jury hear about the unusual manner in which her statement was extracted from her.

ii. The court of appeals essentially adopted the government's position below that Eleby, Jacobs, and Porter were impeached so often, and in so many ways, that any additional impeachment would have had little effect. Pet. App. 46a-47a; Gov't C.A. Br. 105-110. But the government cannot have it both ways: if the government intends to argue that Eleby's, Jacobs's, and Porter's testimony is relevant to the materiality analysis insofar as their testimony generally corroborates a group-attack theory, as the court of appeals suggested, see Pet. App. 49a, then additional impeachment of them is hardly inconsequential.

That is especially true given the nature of the impeachment evidence. A jury would have had doubts about Eleby's entire testimony if it learned that she was high on PCP when she met with investigators. Similarly, a jury would have questioned Jacobs's testimony if it knew that she was harassed into giving a statement and then repeatedly told detectives it was a lie. Nor would a jury have credited Porter's testimony that one of the petitioners

confessed to her if it had learned that she originally had told police essentially the same story about someone else—and even that original statement was a lie. Indeed, the fact that Porter agreed to tell that lie because her friend, Eleby, asked her to would have further eroded the credibility of Eleby and Jacobs as well, as they were friends who testified to witnessing the assault together.

The suppressed information regarding Eleby, Jacobs, and Porter would have further called into question the investigation and, indeed, the prosecutors. *Kyles*, 514 U.S. at 445. The jury may have lost confidence in the prosecutors upon learning that they stood by while a detective manipulated and intimidated a fourteen-year-old runaway, or accepted evidence that had been gathered from someone who was high on drugs. The same jury would have harbored concerns about the investigation as a whole upon learning that it had been built on statements derived from such techniques.

iii. As to Thomas, the prosecution withheld evidence contradicting his trial testimony that he had told his aunt about seeing a group attack in the alley. Pet. App. 23a. Thomas's aunt was the only person who could corroborate or contradict his account of his actions that day because, unlike the other purported eyewitnesses, Thomas did not claim to have witnessed the assault with anyone else. As investigators knew, however, his aunt did not recall such a conversation. A1010.

Between his grand jury appearances and trial testimony, Thomas had changed both what he purportedly saw and where he purportedly saw it. See p. 13, *supra*. "A jury would reasonably have been troubled by the adjustments" in Thomas's testimony. *Kyles*, 514 U.S. at 443. And the jury's verdict indicates that it "disbelieve[d]" Thomas insofar as it convicted someone that he said was not present. Pet. App. 47a. To the extent, then, that his

testimony had any "strengths," *ibid.*, evidence showing that it lacked corroboration would have been useful in fully impeaching his testimony.

C. The Court Should Clarify That Evidence Developed After Trial May Be Considered In Evaluating The Materiality Of Evidence Suppressed Before Trial

When petitioners learned that McMillan had been seen acting suspiciously in the alley as part of discovery in their post-conviction proceeding, McMillan was already serving a life sentence for a disturbingly similar murder committed in 1992 just three blocks from the garage where Mrs. Fuller was killed. Like Mrs. Fuller, McMillan's 1992 victim was "dragged * * * through" an alley. Like Mrs. Fuller, McMillan's 1992 victim was found naked from the waist down with her sweater "pushed up." Gov't C.A. Br. 53. And, like Mrs. Fuller, McMillan's 1992 victim suffered injuries from an act of sodomy that a medical examiner classified as "unusual" and "rare." A2179-2180. Between Mrs. Fuller's murder in October 1984 and his 1992 murder, McMillan was outside of custody for only about three months.

The materiality of the evidence withheld from petitioners at trial is manifest, but it is further "confirmed by" McMillan's 1992 murder. *Kyles*, 514 U.S. at 448. The government has conceded that the Court can consider McMillan's 1992 murder to the extent it shows how petitioners' original trial would have unfolded. See Br. in Opp. 19. In that regard, the 1992 murder reveals three evidentiary theories petitioners would have developed in their original trial. First, because McMillan committed the 1992 assault alone, and inflicted greater injuries on that victim than had been inflicted on Mrs. Fuller, Pet. App. 112a n.14, petitioners would have developed evidence that McMillan was capable of inflicting the injuries on Mrs. Fuller by

himself. Second, petitioners would have developed evidence of McMillan's propensity to sodomy and sexual violence, as expert testimony confirms that someone who commits such an act is likely to do so more than once. Pet. App. 19a. And, third, petitioners would have developed further evidence that McMillan did not commit crimes with large groups.

The Court should go further, however, and consider the similarities between McMillan's 1992 murder and the crime of which petitioners are convicted in evaluating the materiality of the evidence placing him at the crime scene. The reality is that the evidentiary record for a *Brady* claim is made years after the fact. Events that occur after trial already shape that record: physical evidence can be misplaced or devolve; or a witness may move or his memory fade. These events benefit the party that does not bear the burden of proof, which here is the government. See, *e.g.*, *McCleskey* v. *Zant*, 499 U.S. 467, 491 (1991).

The government derived an advantage in petitioners' trial by suppressing the McMillan evidence. It should not benefit again in petitioners' post-trial proceedings by being shielded from the full evidence that would be available to a jury considering petitioners' guilt today. Such an outcome is inconsistent with the materiality standard's "overriding concern with the justice of the finding of guilt." *Agurs*, 427 U.S. at 112. Nor can reviewing courts satisfy that "overwhelming concern" if they turn a blind eye to probative evidence that speaks to the fundamental justice of the defendant's conviction. Here, the power of that evidence is stark, as McMillan's chillingly similar 1992 murder is the best possible evidence that petitioners' convictions are unjust.

* * * * *

With or without consideration of McMillan's 1992 murder, the cumulative power and breadth of the suppressed evidence is remarkable. That evidence begins with the statements placing McMillan, a violent felon convicted of similar crimes, at the crime scene and acting suspiciously. It continues with statements from witnesses at the crime scene at the estimated time of death that directly suggest that Mrs. Fuller was killed by one or two people, which, of course, is precisely what a reasonable juror would infer based on the suppressed evidence regarding McMillan.

To rebut the persuasiveness of this evidence, the government can call only on the strained and contradictory testimony of purported eyewitnesses. That testimony would have been undermined by the preceding suppressed evidence, as well as evidence further impeaching the prosecution's witnesses and its investigation itself. Even without the suppressed evidence, the jury in petitioners' case struggled to reach a verdict. With it, there is far more than a mere "reasonable probability" that the jury would have had reasonable doubt and therefore would have voted to acquit. *Smith*, 132 S. Ct. at 630.

CONCLUSION

The judgment of the District of Columbia Court of Appeals should be reversed.

Respectfully submitted.

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In the Supreme Court of the United States

CHARLES S. TURNER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

RUSSELL L. OVERTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI
TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the petitioners' convictions must be set aside under *Brady* v. *Maryland*, 373 U.S. 83 (1963).

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Constitution and statutes:

U.S. Const. Amend. V (Due Process Clause) 50
Innocence Protection Act of 2004, Pub. L. No. 108-405, Tit. IV, 118 Stat. 2278 (D.C. Code § 22-4135 (2001)) 2
D.C. Code:
§ 22-2101 (1981) 1
§ 22-2401 (1981) 2
§ 22-2901 (1981) 1
§ 22-3202 (1981) 1, 2
§ 23-110 (2001) 2

Miscellaneous:

Patrice Gaines, *A Case of Conviction*, Washington Post, May 6, 2001 26

In the Supreme Court of the United States

No. 15-1503

CHARLES S. TURNER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 15-1504

RUSSELL L. OVERTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI
TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES

STATEMENT

This case involves the brutal 1984 murder of a 48-year old wife and mother, Catherine Fuller, near her home in Northeast Washington, D.C. In 1985, following a jury trial in the Superior Court for the District of Columbia, petitioners Charles Turner ("Fella"), Christopher Turner ("Chrissie"), Levy Rouse, Clifton Yarborough, Kelvin Smith ("Hollywood"), Timothy Catlett ("Snotrag" or "Tim-Tim"), and Russell Overton ("Bo-Bo") were convicted of kidnapping, in violation of D.C. Code § 22-2101 (1981); armed robbery, in violation of D.C. Code §§ 22-2901, 22-3202 (1981); and

two counts of first-degree felony murder while armed, in violation of D.C. Code §§ 22-2401, 22-3202 (1981). The trial court sentenced Charles Turner, Rouse, Yarborough, Smith, Catlett, and Overton to 35 years to life imprisonment. The court sentenced Christopher Turner to 27-and-one-half years to life imprisonment. 545 A.2d 1202, 1219 & n.33, cert. denied, 488 U.S. 1017 (1989). On appeal, the D.C. Court of Appeals affirmed petitioners' convictions but remanded for resentencing. *Id.* at 1206, 1215, 1219; Nos. 86-314 & 90-630, Mem. Op. & Judgment 1 n.1 (Jan. 24, 1992) (Charles Turner). The trial court resentenced petitioners to the same amount of prison time. Pet. App. 82a n.2.[1]

Beginning in 2010, petitioners moved to vacate their convictions under D.C. Code § 23-110 (2001), and the Innocence Protection Act of 2004 (IPA), Pub. L. No. 108-405, Tit. IV, 118 Stat. 2278 (D.C. Code § 22-4135 (2001)). The trial court denied those motions. Pet. App. 81a-131a. The D.C. Court of Appeals affirmed. *Id.* at 1a-78a.

A. Catherine Fuller's Murder And The Government Investigation

1. On October 1, 1984, Catherine Fuller was assaulted, robbed, sodomized, and murdered in an alley near her Washington, D.C. home. Mrs. Fuller lived

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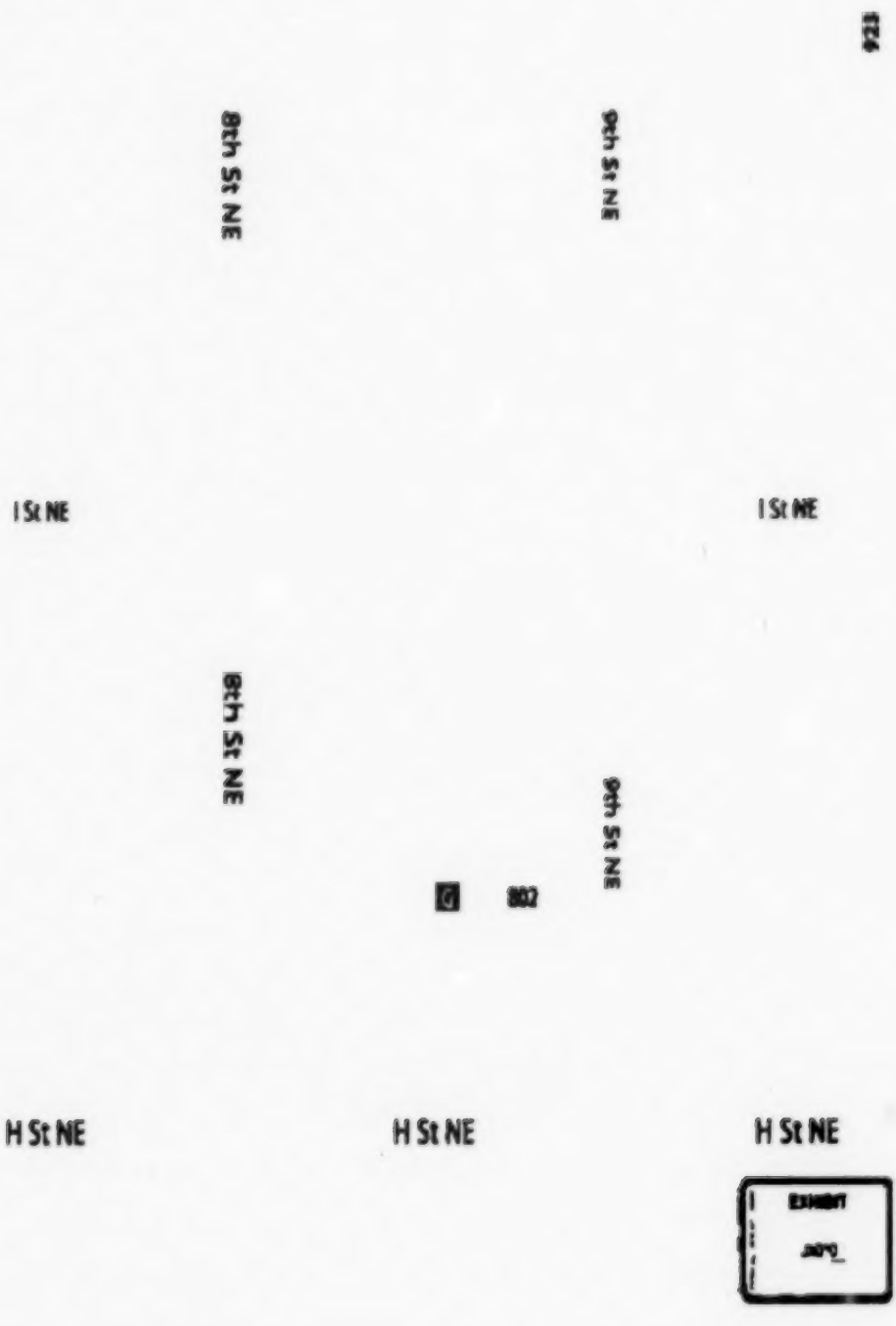
[1] Citations to "Pet. App." refer to the appendix to No. 15-1503. "J.A." refers to a 340-page joint appendix. The parties have moved to designate the ten-volume court of appeals appendix (A1-A2604) as additional volumes of the joint appendix. The record also includes full transcripts of petitioners' trial (A2918-A11655) and of the post-conviction hearing (A11656-A14374) in electronic format. For the Court's convenience, an appendix to this brief contains a glossary identifying the major participants in this case.

with her husband and children at 923 K Street, N.E. A5156-A5158; J.A. 29. She was 4' 11" tall and weighed 99 pounds. A7988. Fuller left her house sometime after 4:30 p.m., carrying $50 in a small purse that she concealed in her bosom area. A198, A5161-A5162, A5209. She had curlers in her hair, covered by a scarf, and wore a watch, rings, and necklaces. A5168-A5169, A5210. Because the day was rainy, Fuller wore a raincoat and carried an umbrella. A5168-A5172. Her family never saw her alive again.

That day, William Freeman worked at a vending stand on the northwest corner of Eighth and H Streets, N.E. A202-A205. Around 6 p.m., Freeman entered an alley running north of, and parallel to, H Street, around the corner from his vending stand. A207-A210; Pet. App. 81a. Freeman entered the alley from Eighth Street and headed to a garage where he had urinated earlier that day. A207-A209. This time, he saw blood near the garage door. A210-A211. Freeman went inside the garage and saw a woman lying motionless on the ground. A211-A212. After failing to rouse her, Freeman ran back to the vending stand and told his boss, James Robinson, what he had seen. A212-A213. Robinson and his girlfriend, Jackie Tylie, confirmed Freeman's discovery, and Tylie called the police. A213-A214.

Below is a map of the area from a trial exhibit (J.A. 29) (cropped):



Fuller's body was naked from the waist down, and her sweater and brassiere had been pulled up to her armpit area, exposing her breasts. A5062-A5063. Her jewelry was gone. A5140-A5141. Blood had flowed from Fuller's rectum underneath her body and under the garage door, and pooled on the ground. A5063. Fuller had four broken ribs, extensive damage to her liver, and multiple bruises, lacerations, and contusions to her face, head, and torso, including large patterned lacerations on her back indicating that she had been dragged. A5064, A7990-A7994, A7997-A8005. The wall of her rectum had been pierced, and Fuller had internal injuries along an 11-inch wound track. A8010-A8019.

2. Homicide detectives Ruben Sanchez-Serrano and Patrick McGinnis from the Metropolitan Police Department were assigned to the case. A13433-A13436. The detectives immediately began investigating Fuller's murder and received a major break the next day. On the afternoon of October 2, 1984, while Detective Sanchez-Serrano canvassed the area, a woman walking past the entrance to the alley on Ninth Street told him that around 5 p.m. the day before, she saw Yarborough standing at the end of the alley near Ninth Street, moving his head from side to side. A1368, A13442-A13446. The woman was scared and trembling, and gave the detective a false name. A13443-A13446.

On October 4, 1984, Yarborough agreed to come to the police station for questioning. A13872-A13875. Yarborough initially provided an alibi that detectives quickly proved false. A13875-A13878. He then gave a statement. A1178-A1185, A13878-A13885. Yarborough said that he was standing on Eighth and H Streets on

the day of the murder with some friends, and one of them said "that lady has some money, big money" and suggested that they "go get paid," meaning they should rob her. A1178, A1180, A1182. Yarborough described the woman as wearing a scarf and a dark-colored trench coat. A1182. He also recalled that it was raining and not quite dark outside. *Ibid.* Yarborough stated that eight people (including petitioners Rouse and Charles Turner) crossed the street and "went behind [the lady]" as she turned the corner at Eighth and H Streets, and the woman began to scream. A1178, A1183. Yarborough admitted "standing beside the alley at 9th Street," but claimed that he left and did not participate in the attack. A1179.

Based on Yarborough's statement, police arrested Alphonso Harris ("Monk"). A13888. Harris denied involvement and gave an alibi. A13973-A13974. Detectives continued to pursue leads with little cooperation until late November, when Detective Donald Gossage responded to a stabbing incident at the Washington Coliseum. A13733-A13734. There, a young woman named Carrie Eleby blurted out to Gossage that the "person that did this stabbing was the same person that killed the lady at 8th and H." A13734.[2] Gossage told Detective McGinnis, who questioned Eleby on November 28, 1984. A13735, A13890. Eleby said that Calvin Alston had admitted to her that he was involved in robbing Fuller and that Alston had also "put in" Catlett, Rouse, and Christopher Turner. A13890.

Alston was arrested on November 29, 1984, and on that day he gave a videotaped statement. A1145-

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[2] Police later determined that Catlett was involved in the Coliseum stabbing. A13738.

A1177 (transcript), A2914. Alston described a group attack that started in the park across from the 800 block of H Street. A1148-A1149. He said that Rouse and Charles Turner pushed Fuller into the alley from Eighth Street while others went toward Ninth Street. A1149, A1153. The group then proceeded to beat Fuller, undress her, steal her jewelry, and drag her into a garage, where Rouse sodomized her with a pole. A1149-A1167. Alston named petitioners and others as active participants, while describing himself as a look-out. A1149-A1153.

Yarborough was arrested on December 9, 1984, and he likewise gave a videotaped statement. A1028-A1070 (transcript), A2916, A13908-A13910. That statement resembled Yarborough's earlier written statement, but Yarborough now acknowledged that he had seen Fuller get dragged to "the cut" of the alley (an area where the alley is bisected by another alley that runs north and then forks off into two smaller alleys that connect to I Street (J.A. 29)), where she was slammed, stomped and hit by "the fellas," including petitioners. A1032-A1040. Yarborough also acknowledged that Rouse "stuck a pole in her." A1032. He saw people take Fuller's rings and chains when they ripped off her blouse. A1046-A1047. Yarborough recalled Fuller wearing a coat that came down to her thighs and carrying an umbrella. A1061-A1062.

3. An exhaustive police investigation, stymied at times by a code of silence and climate of fear, ultimately confirmed that multiple young men, including petitioners, had murdered Fuller while looking to "get paid." A1942, A7414, A13973.

a. Two participants in the attack—Alston and Harry Bennett ("Derrick"), whose own videotaped statement

described the group attack (A1071-A1144 (transcript), A2917)—pleaded guilty and agreed to testify at trial. Alston pleaded guilty to second-degree murder and was sentenced to 12 to 36 years of imprisonment. A6299-A6304, A12049. Bennett pleaded guilty to manslaughter and robbery and was sentenced to eight to 30 years of imprisonment. A5792-A5800; Gov't C.A. Br. 5 n.4.

b. Co-defendant Steven Webb told police how the attack unfolded in the park, with one group crossing the street and heading toward Eighth Street and another group heading toward Ninth Street. A14038-A14040. Webb twice became very upset when he described how the group accosted Fuller and said that he stood on the corner while others took her into the alley. *Ibid.*

c. James Michael Campbell ("Mike") gave a videotaped statement acknowledging that, although he did not participate, he watched and followed as the group left the park, pushed Fuller into the alley, and attacked and sodomized her. J.A. 306; A13261-A13262.

d. Roland Franklin ("Burt"), who ultimately was not indicted, Pet. App. 83a n.3, gave a videotaped statement describing events before and after the crime that implicated several petitioners. A2915.

e. Christopher Taylor, who testified at trial as a defense witness, previously gave a statement to police describing a group attack in the alley. See A10432-A10439, A10493, A10499-A10500, A10505-A10506.

f. Police located a witness who had watched petitioners planning the crime in the park and three witnesses who saw the attack in the alley, and many people later heard petitioners make incriminating remarks. See pp. 10-11, 13-18, *infra*.

4. All told, police gathered at least 11 independent accounts of a group leaving the park in pursuit of Fuller, the attack in the alley, or both. As the court of appeals later concluded, the investigation amassed "overwhelming" proof that petitioners participated in that attack. See 545 A.2d at 1206 n.2; see also Pet. App. 123a.

The evidence was not seamless: the brutal crime "happened quickly in a moving rush of bodies." A10952 (defense closing). Unsurprisingly, witnesses differed on certain details. And some made false statements before trial to minimize their culpability or protect friends. But the witnesses' accounts of the core event largely coincided and were unanimous on critical matters. Everyone present, for example, recalled that Rouse sodomized Fuller with a pipe. And many witnesses recalled telling details: A teenaged spectator noticed that Fuller's curlers, which had fallen on the ground, were pink. A7120. Yarborough knew what Fuller wore and that she concealed her purse "in her breast part." A1046. Alston knew that Fuller was wearing pantyhose, a coat, and "a rain thing tied around her head." A1150, A1168. These multiple cross-corroborating accounts, obtained in an investigation that the trial court later found free of taint from alleged police harm to witnesses, coaching of witnesses, feeding them information, or urging them to alter unconvincing details, Pet. App. 100a, formed the basis for petitioners' prosecution.

B. The Trial

A grand jury charged petitioners and five others with kidnapping, armed robbery, and two counts of first-degree felony murder while armed. A1718-A1720; Pet. App. 5a. In addition to petitioners, the grand

jury charged Alston, Webb, Campbell, Harris, and Felicia Ruffin.[3] Campbell's case was severed when his attorney became ill, and he later pleaded guilty to manslaughter and attempted robbery. *Id.* at 5a, 83a n.3.

1. The government's case

Assistant United States Attorneys Jerry Goren and Jeffrey Behm represented the government in a six-week jury trial before Judge Robert M. Scott of the D.C. Superior Court. The prosecution presented its case as follows.

a. The gathering in the park

Melvin Montgomery spent October 1, 1984, in and around a park on the south side of H Street, between Eighth and Ninth Streets. A265-A268, A274-A280, A283, A285-A286, A291; J.A. 68-69. There, he repeatedly saw Overton, Catlett, Rouse, and Charles Turner gathered with others. *Ibid.* By afternoon, the group became noisy. J.A. 68-71. Catlett jumped on and off a wall singing a popular Chuck Brown song, "We Need Some Money." J.A. 71-72. Alston, who arrived at the park shortly after 4 p.m., described the same scene and placed all of the petitioners in the group. A455-A457, A460-A464. Webb banged out a beat on a telephone as Catlett sang. A461-A462.

The conversation turned to "getting paid," and Alston suggested robbing someone. A466-A467. A group of about 15 people, including petitioners, said they were "game." A470-A471, A6425, A6432. Alston then spotted Fuller across H Street and suggested robbing

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[3] Bennett entered a guilty plea in April 1985 and was not charged in the indictment. A5792-A5794.

her. A471-A473. Bennett recalled Alston saying "Let's go get that lady." A368-A370, A5917. Montgomery likewise heard somebody say "they were going to get that one," and when he turned around to look, Montgomery saw Overton pointing in the direction of a woman standing near the corner. J.A. 77-79. At that point, the group began to leave the park. A376-A382 (Bennett); A473-A477 (Alston); J.A. 80-82 (Montgomery).

b. The attack in the alley

After petitioners left the park, a fast-moving, chaotic scene unfolded. Eyewitnesses diverged on details but agreed on the key points.

i. Everyone agreed that Fuller's assailants crossed to the north side of H Street and divided into two groups, with one group headed toward Eighth Street and the other toward Ninth Street. A376-A384 (Bennett); A473-A484 (Alston); J.A. 80-82 (Montgomery). A group including Alston and Rouse followed Fuller to the corner of Eighth and H Streets. A376-A380 (Bennett); A473-A474 (Alston). Alston testified that Charles Turner joined the group following Fuller up Eighth Street, A473-A474, and Montgomery recalled that Rouse and Charles Turner were "together" and headed toward Eighth Street, J.A. 80. Yarborough (who was headed toward Ninth Street) promised to "pay [Alston] later" for acting as a lookout. A475, A6440-A6441. The group following Fuller got "[r]eal close" and appeared to talk to her. A376-A380. Charles Turner said something to Fuller and, as she turned around, he shoved her into the alley. A477-A479, A6446. Alston briefly acted as a "lookout," then entered the alley himself. A480, A6454.

Fuller fought back by punching Charles Turner. A480. Charles Turner replied with a punch, and Rouse hit her head with a piece of wood. A480, A6452, A6455. Alston and others, who had appeared from Ninth Street (including Christopher Turner and Smith) joined in, pummeling and kicking Fuller as she cried out for help. A481-A485. The assailants shoved one another, "trying to get in a lick." A486. Bennett, who stopped at the corner to look for police, then entered the alley from Eighth Street and saw Catlett, Alston, Webb, and Rouse beating Fuller as she begged for help. A383-A386.

The group forced Fuller to the cut of the alley. A387, A487-A488. At that point, Overton, Christopher Turner, and Smith assaulted Fuller, knocking her to the ground as she kicked and swung her fists to fight back. A388-A389, A484. Alston recalled seeing Catlett, Overton, and Yarborough join in the beating in front of the garage, while Webb, Smith, Christopher Turner, and others struggled nearby. A490.

ii. Fuller's necklaces had come off during the struggle, and onlookers picked them up. A391, A400. Catlett and Yarborough fought over Fuller's change purse before Catlett dumped its contents in the alley. A408-A409, A494-A495. Overton dragged Fuller by the feet into a garage at the cut of the alley. A401-A402, A491-A493; J.A. 29. By this time, Fuller's clothing, including her raincoat, had been torn off. A406-A407, A493. Rouse removed a ring from Fuller's hand and gave it to Ruffin. A406. Bennett and others went into the garage, and although the scene was chaotic and people were moving "[i]n and out of the garage," it appeared to Bennett that Webb and Alston were holding Fuller's legs while Rouse prepared to sodomize her

with a pole. A402-A405, A409-A411. Alston said he stood right beside Charles Turner, who along with Overton held Fuller's legs while Rouse shoved a pole up her rectum. A497-A499. Through tears, Bennett testified that Fuller and Catlett implored Rouse to stop, but Alston and Webb urged him to "push it further up." A5897-A5898. Two days later, Yarborough gave Alston ten dollars. A505, A6367-A6368.

In describing the attack, Alston and Bennett divided on some details. Bennett recalled that Overton and Webb joined the group that followed Fuller, A376-A380, while Alston believed that Overton and Webb went toward Ninth Street, A473-A474; see J.A. 80 (Montgomery saw Overton and Catlett go toward Ninth Street). And they gave different accounts of who joined in the beating when, and who held Fuller's legs as Rouse shoved a pole in her rectum. See pp. 12-13, *supra*. But both described the same group attack in the alley, culminating in Rouse's act of sodomy.

iii. Onlookers witnessed Fuller's beating. A402-A406. Carrie Eleby and Linda Jacobs, 17 and 15 at trial, described what they saw. A6894, A7524. That afternoon, Eleby and Jacobs went to Eighth and H Streets looking for Smith, whom Eleby was dating. They walked around and smoked PCP. A534-A535, A7533-A7536. As they walked down Eighth Street toward the alley, they heard a scream and turned to see a "gang of boys" near the garage beating on somebody. A539-A541. They moved into the alley, and Eleby saw Christopher Turner, Smith, Catlett, Rouse, Overton, Alston, and Webb kicking Fuller while Yarborough stood near the garage. A544-A549. Jacobs likewise saw a "gang of people" fighting. A653. Both Eleby and Jacobs saw Rouse sodomize Fuller

with a pole, A553, A661, A7023-A7024, and Eleby recalled that Overton held Fuller's legs, A553-A554.

Again, the testimony of these onlookers differed on details. For example, Eleby said she stayed outside the garage while Jacobs testified that she and Eleby went inside. A550, A657-A659. Nevertheless, they described the same event as other eyewitnesses and participants. And tellingly, while recounting Rouse's "putting a pole" in Fuller, Jacobs began to sob. A658-A661; see A10861.

iv. Maurice Thomas, a 14-year-old student at the time of trial, also witnessed the crime. J.A. 106. Thomas went to eat at his Aunt Barbara's house that afternoon, at the corner of Eleventh and H Streets. J.A. 114-115. Aunt Barbara finished eating first, and she washed the dishes and grabbed her coat and an umbrella. J.A. 115-116. She left for Thomas's house (1012 Ninth Street, N.E.) and told Thomas to go home when he finished eating. J.A. 106, 116; A7262, A7264. Thomas left after Aunt Barbara and walked down H Street. J.A. 116-117. He turned at the corner of Ninth and H, and as he glanced into the alley between Eighth and Ninth Streets, he saw a group of people surrounding someone. J.A. 117-118. Catlett patted the person down and put something in his own pocket. J.A. 118-119. Catlett then hit the person, J.A. 119, and the rest of the group joined in the beating as the victim fell down and cried out for help, J.A. 119-120. Thomas was certain that he recognized Catlett, Yarborough, Rouse, and Charles Turner in the group. J.A. 123-125. He thought (but was less certain) that he recognized Christopher Turner, Smith, and Bennett. J.A. 125-126; A645, A7299-A7300. Thomas also

saw other people standing in the alley about 15 feet behind the group beating Fuller. J.A. 122-123; A7387.

Thomas took off running. He found his Aunt Barbara on the front porch of his house and told her what he had just seen. J.A. 120, 122. Aunt Barbara told Thomas not to tell anyone else. J.A. 120-121.

c. The discovery of Mrs. Fuller's body

William Freeman found Fuller's body around 6 p.m. when he went into the alley to urinate. A207-A212. He was alone in the alley at the time. A251-A252. The garage was a two-story brick structure with two metal doors on the front that slid on a track around to the sides of the garage. A5061; see J.A. 34-35. When Freeman arrived at the garage, one of its doors was open about three feet. A210, A245. Freeman ran back to the vending stand and told his boss, Robinson, what he had seen. A212-A213. Robinson's girlfriend Tylie called the police. A213-A214.

Freeman and Tylie returned to the alley to wait for the police. A214-A215. As they stood near the garage, two young men ran into the alley from Ninth Street. A215, A218-A219, A240-A243. The men stopped about four feet away from the garage, but they did not enter the garage or look inside. A215-A216, A219, A240-A244. One of the men had a small bulge in his coat, as if holding something underneath. A242-A243. The men stood in the alley for a few minutes until a police officer drove in from Eighth Street. A215-A216. Freeman heard one of the men say "Don't run" when the officer arrived, but the two men ran up the cut of the alley toward I Street. A218-A219, A256, A5275. Freeman had seen those two men earlier in the day, walking up and down Eighth Street. A236-A237. Because of the rain, the vendors spent most of

the day watching their plastic-covered merchandise from inside of Robinson's van, parked on H Street. A206-A207, A231-A237.

Officer Stephanie Ball arrived at about 6:16 p.m. A5278. Police officers found Fuller's body, naked from the waist down and badly beaten, inside the garage behind the closed left-side door. A5062-A5063, A5280-A5281. They collected evidence inside the garage, including Fuller's blue jeans, underpants, pantyhose, boots, change purse, and keys. A5064-A5065, A5069, A5071-A5072. The next day, with assistance from Fuller's sister, police recovered from the alley Fuller's raincoat, some of its missing buttons, her bent umbrella, a head scarf, and some pink hair rollers. A5194-A5196, A5198-A5207.

Dr. Michael Bray, the medical examiner, estimated that Fuller died between 4:30 and 6:30 pm. A7976-A7978. He emphasized that it was especially difficult to determine an exact time of death because Fuller was thin, almost naked, and died while lying on a concrete floor on a chilly night. *Ibid.* Dr. Bray testified that it was not possible to tell how many times Fuller was struck or how many people inflicted her injuries. A711-A712, A7995-A7996, A8006-A8008.

d. Other evidence introduced against petitioners

The prosecution introduced the following additional evidence:

- On the night of the murder, Maurice Thomas overheard Catlett tell another man in a store at Ninth and I Streets that "we had to kill her be-

cause she spotted someone [Catlett] was with." J.A. 126-128.[4]

- On the night of the murder, Rouse's girlfriend Catrina Ward saw blood spattered on the bottom of one of Rouse's pant legs. A755-A758.
- Later in October, Rouse confided in Ward that "one of his friends thought he was snitching." A758. He denied participating in the murder but said he knew that "the lady" had had a coin purse instead of a wallet because he had been in the alley. A759.
- On December 6, 1984, after Ward called Rouse a "nasty dog" for "d[oing] something nasty in [her] kitchen," Rouse replied that he had done worse things and said, "I did the worst thing to that lady in the alley." A760.
- On December 9, 1984, while Christopher Turner and Overton were in a holding cell, Detective Daniel Villars overheard Turner tell Overton that the police did not have enough to charge them because they did not touch the body. Overton replied that he knew the two people who "gave them up," Turner agreed and named one of them, and the two agreed that police knew where everybody was in the alley. A690-A691. When Overton noticed Villars, Turner told Over-

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[4] Catlett stated that Fuller had spotted Yarborough, a fact that was omitted at trial pursuant to *Bruton* v. *United States*, 391 U.S. 123 (1968). A1010, A7356-A7357. At the post-conviction hearing, Yarborough confirmed that he and Fuller knew each other. A11853-A11854.

ton not to worry because Villars "just came in" and "didn't hear anything." A692.

- The government admitted Yarborough's December 9, 1984, videotaped statement against him, redacted so as not to implicate his co-defendants. A715-A717, A11129.
- Sometime after Fuller's murder, Kaye Porter asked Catlett why he "d[id] that to that lady," and Catlett replied that "[a]ll he did was kick her and somebody else stuck the pole up in her," because Fuller "wasn't acting right." A7757-A7758.

2. The defense strategy

a. The government's witnesses left "considerable room for impeachment and extensive cross examination by the ten skilled defense attorneys." Pet. App. 82a. Alston and Bennett received plea bargains in exchange for their testimony, see pp. 7-8, *supra*, and Bennett received the additional benefit of release from prison pending sentencing, A5792-A5800. Both men had made prior statements minimizing or denying their participation in the murder, and Bennett had previously implicated Catrina Ward, his former girlfriend who was later dating Rouse, before retracting that claim. During trial, Ward and Bennett began dating once again. A761, A5798, A5905-A5910, A5937-A5940, A5960-A5961, A5963-A5967, A6014-A6016, A6029-A6033, A6073-A6074, A6106-A6107, A6371, A6582-A6583, A6585, A10348. Alston acknowledged that, after reporting his rape in prison, he had falsely recanted his accusations against one of the perpetrators after being threatened. A6590-A6598. Rouse testified that Bennett was angry at him for dating

Ward and that Alston was angry at him because Rouse had teased Alston about his prison rape. A9024-A9025.

The defense exposed credibility problems with other prosecution witnesses. Eleby admitted that she had lied before the grand jury about whether Smith and Christopher Turner were involved in the attack on Fuller—an admission that drew the trial court's express instruction that Eleby's testimony "should be received with caution and scrutinized with care." A856-A857, A6943-A6944, A7009-A7011, A7111-A7112. Eleby was impeached with other statements to the grand jury that conflicted with her trial testimony. See, *e.g.*, A6974, A6985-A6986, A7027-A7029. The jury also learned that Eleby initially told police that she had not been in the alley but had only heard what had happened from Alston. A8595-A8599.

Ward admitted that she did not tell the grand jury everything she knew about Rouse, who was the father of her child. A760-A761. Jacobs was impeached with her earlier denials that she witnessed the attack. A7673-A7674, A7707-A7708. Porter was impeached with grand jury testimony in which she said that Catlett told her "he didn't do nothing to the lady." A7776, A7780.

Attempts to impeach some government witnesses, however, largely fell flat. Petitioners noted that Montgomery originally told the police he did not know anything, and Montgomery testified that police said that if he refused to talk to them, he "would be involved." A322. And two witnesses testified that Thomas did not like Yarborough. A10169-A10171, A10184-A10185, A10189-A10191. But as defense attorney Michelle Roberts noted in her closing argu-

ment, Montgomery and Thomas had "no motive to lie, no skin to save, no deals with the Government." A10762-A10764. Overton echoed those points about Thomas, describing him as having "all the signs of being there and being an honest kid." A10819.

b. Catlett put on no defense. Yarborough's attorney claimed in his opening statement that the evidence would show Yarborough was at his girlfriend's house at the time of the murder. A5040-A5042. Yarborough's girlfriend testified at trial but provided no such alibi. A10184-A10191.

Overton, Smith, Christopher Turner, Charles Turner, and Rouse put on alibi defenses. Overton's alibi witnesses claimed that he left the park drunk before 3 p.m. and was asleep when Fuller died. A8608-A8764. The key witness to that story, Overton's grandmother Edna Adams, was substantially impeached with her contrary grand jury testimony. A8657-A8658, A8664, A8682-A8692. Ultimately, she acknowledged that her testimony could relate to an entirely different day, that her daughter and granddaughter had given her "alot of help" on what to say, and that she trusted their statements over her own memory. A8686-A8696. Overton's sister admitted that she and her family had discussed the details of October 1, 1984, after Overton was arrested and that she had told Overton's grandmother "some things about the truth" of what had happened that day. A8755-A8759, A8761, A8763.

Smith and Christopher Turner provided alibis for each other, stating that they were at Smith's house all day on October 1. Smith testified that he woke up at home around 4 p.m. and stayed there. A9421-A9425. Christopher Turner said he spent the night before the

murder at Smith's house and that he stayed there the entire next day, playing video games and watching television. A10053-A10066.

Rouse and Charles Turner had conflicting alibis. Rouse testified that he spent the afternoon with Charles Turner and a friend named Christopher Taylor at a recreation center, restaurants, and arcades. A9008-A9020, A9089-A9097. Rouse said that he only went to the alley around 7 p.m., after police were already there. A9020-A9023, A9151.

Christopher Taylor corroborated Rouse's alibi. A8829, A8838-A8845, A8850-A8851, A8869-A8870; A8875-A8876. But Taylor had previously told police that he was in the park and heard the group decide to assault Fuller and that he was in the alley and saw the murder. A8881, A8884-A8891, A8926-A8929. On cross-examination, Taylor claimed not to remember those statements, *ibid.*, but on rebuttal, Detectives Thomas Kaschak and Johnny Greene testified that Taylor had previously told police that he was in the alley when Fuller was murdered. A571, A10432-A10439, A10493, A10499-A10500, A10505-A10506.

Charles Turner contradicted Rouse's alibi by testifying that he was at home during the time of Fuller's murder and left there only when Rouse and a friend named Vincent Gardner came by and told him someone had been killed in the alley. A9703, A9713-A9714, A9735-A9737, A9767-A9784. He then went with Rouse and Gardner to the alley. A9710-A9713. Gardner, testifying as a rebuttal witness, denied going to Charles Turner's house or going anywhere with Rouse that night. A10239-A10240.

3. The jury's verdicts

After deliberating for seven days, the jury convicted Charles Turner, Rouse, Yarborough, Smith, Catlett, and Webb (now deceased) on all counts, while acquitting Harris and Ruffin. Pet. App. 10a-11a. Two days later, the jury convicted Overton and Christopher Turner on all counts. *Id.* at 11a.

C. Petitioners' Direct Appeals

1. Petitioners (excluding Charles Turner) took a consolidated appeal. Pet. App. 82a n.1. The court of appeals upheld the jury's verdicts but remanded for resentencing. 545 A.2d at 1202, 1219. The court found "overwhelming evidence that each of them was involved at one time or another." *Id.* at 1206 n.2; *id.* at 1217 (testimony against Overton was "overwhelming"). The court also affirmed the trial court's finding that Yarborough's videotaped statement did not result from coercion. *Id.* at 1207-1209 & n.5. The court of appeals rejected Catlett's claim that he was entitled to a missing-witness instruction on Maurice Thomas's Aunt Barbara, noting that defense counsel had Aunt Barbara's address but "chose to neither interview [her] nor call [her] to the stand." *Id.* at 1210 n.13. The court held, however, that petitioners' convictions for first-degree murder merged with their convictions for kidnapping and armed robbery and that each petitioner could only be sentenced for one felony murder. *Id.* at 1206, 1215, 1219. On remand, the trial court resentenced each petitioner to the same aggregate amount of prison time that he had received in the first sentencing. Pet. App. 82a n.2.

2. The court of appeals later upheld the jury's verdict in the separate appeal of Charles Turner and denied his ineffective assistance of counsel claims.

The court concluded that any deficiencies in counsel's performance did not prejudice Turner because the evidence against him was "so overwhelming." Mem. Op. & Judgment 2.

D. Post-Conviction Proceedings

Beginning in 2010, petitioners moved to vacate their convictions, or, in the alternative, for a new trial. Pet. App. 84a n.4. Petitioners raised claims under the IPA; Yarborough raised an ineffective-assistance claim; and petitioners claimed that the government had failed to disclose material exculpatory and impeachment information to the defense before trial, in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963). In 2012, D.C. Superior Court Judge Frederick H. Weisberg conducted a 16-day evidentiary hearing on petitioners' post-conviction motions. Pet. App. 2a, 84a n.4.

1. Innocence Protection Act claims

The basis for petitioners' actual-innocence claims was the purported recantations of Alston, Bennett, Jacobs, and Montgomery. Pet. App. 2a.

a. Alston claimed at the hearing that he was not in the park at Eighth and H Streets on October 1, 1984, and was not present in the alley during the murder. A11978. Alston testified that when he told detectives that he knew nothing about the murder, they became angry and suggested that Alston would get a more lenient sentence if he confessed. A11989-A11993. He further testified that the detectives told him what they believed happened, and he repeated that information back to them, believing that he would be released. See A11989-A12003, A12008-A12012.

Detective McGinnis confirmed that he told Alston that witnesses had placed him at the scene (which was

true), and that he told Alston he could help himself if he told his own account of what happened. A13894-A13899. Detectives McGinnis and Sanchez-Serrano denied telling Alston what to say, giving him any details of the crime, or promising his release. A13477-A13482, A13894-A13899.

b. Bennett likewise denied any involvement in or knowledge of the murder. A12145-A12147. Bennett testified that after he was arrested, he told detectives that he knew nothing about the murder, but after hours of questioning he started telling the detectives details he had heard on the news and repeated what they told him to say, "until they got [him] to say [he] was involved." A12143-A12146, A12150. Bennett claimed that during his videotaped statement, the police "would cut the tape off" at various points and tell him what to say. A12151-A12153.

Detective Sanchez-Serrano confirmed that after Bennett denied being present during Fuller's murder, the detective pressed him by repeatedly asking what happened and suggested that Bennett would help himself by admitting what really occurred. A13501-A13504. Both detectives denied stopping the videotape and telling Bennett what to say or whom to implicate. A13501-A13504, A13922-A13924.

c. Linda Jacobs initially did not recall at the hearing what she testified about at trial, but she nevertheless claimed it was a lie. A12576-A12578. Although Jacobs had signed a 2007 affidavit stating that she went into the alley on the day of the murder, Overton R. 4, Ex. 11 ¶ 7, she testified at the hearing that she never went into the alley and never saw what happened to Fuller. A12583. When the trial court asked her during the hearing about what happened to

Fuller, Jacobs broke down sobbing. A12610-A12611; Pet. App. 107a.

d. Montgomery, who had described at trial the events in the park immediately preceding the attack, testified that after he initially told police that he did not know anything about the murder, Detective Sanchez-Serrano yelled at him and threatened him with prosecution. A11931, A11935-A11936. Montgomery, however, reaffirmed the truthfulness of his trial and grand jury testimony. A11943. Montgomery disavowed an affidavit that he signed on June 1, 2009, which stated that Montgomery had not been in the park on the afternoon of October 1, 1984, and that he had lied at petitioners' trial (see Overton R. 4, Ex. 13). A11939. He testified that he told the person who brought him the affidavit in prison that it incorrectly stated that he had lied at trial, and asked her to take that out, but he signed it "so [he could] come tell the truth" at the hearing. A11941.

2. Yarborough's ineffective assistance claim

Yarborough claimed that his counsel had been ineffective for failing to investigate his intellectual disabilities as grounds for suppressing his videotaped statement. A3558-A3581, A3594-A3636; Pet. App. 2a. Yarborough testified that he did not participate in or have any knowledge of the murder. He claimed that he spent the afternoon and evening of October 1, 1984, at the home of his girlfriend, Chandra Hill. A11712, A11737-A11739. Although Hill had testified at trial and provided no alibi for Yarborough, A10184-A10191, she testified almost 30 years later that Yarborough was at her house during the afternoon and evening of October 1, 1984. A11924-A11926.

Yarborough denied giving the police an eight-page statement on October 4, 1984, and he claimed that police made him initial and sign the document without letting him read it. A11744-A11748, A11858-A11862, A11865, A11888. Yarborough further claimed that his videotaped statement was false and that it was the result of police brutality, including physical assault, threats of murder, and sticking his head in a toilet bowl. A11757-A11784. Yarborough further testified that police coached him for two or three hours before he gave the videotaped statement. A11790-A11800.

Detectives Sanchez-Serrano and McGinnis testified that Yarborough provided the information in his written statement. A13453-A13459, A13877-A13887. Sanchez-Serrano confirmed that he became "excited" during the later interview of Yarborough, and both detectives confirmed that they raised their voices. A13492, A13502, A13910-A13911. The detectives denied that Sanchez-Serrano ever physically abused Yarborough or that the detectives fed him information or told him what to say. A13496-A13501, A13629, A13912-A13919, A14004.

3. *Claims under* Brady *v.* Maryland

Finally, petitioners claimed that the government failed to disclose material exculpatory and impeachment information in violation of *Brady*. One piece of non-disclosed information was a statement implicating James Blue in the murder, which was discussed in a Washington Post article published almost a decade before the first post-conviction motion was filed. See Charles Turner R. 9, Ex. 1 (App. 97-112); Patrice Gaines, *A Case of Conviction*, Washington Post, May

6, 2001.[5] Additionally, as part of these post-conviction proceedings, the government provided petitioners with Goren's entire case file on the Fuller murder. Petitioners then alleged that the government had failed to disclose additional items of purportedly favorable exculpatory and impeachment information that were material to guilt.

a. Information about alternative perpetrators

i. James Blue

On October 26, 1984, Ammie Davis told Lieutenant Frank Loney that Fuller's killer was James Blue. See J.A. 56-58. After being arrested for disorderly conduct, Davis initially told Lieutenant Loney that she saw Blue beat Fuller to death in the alley off of H Street, but a few moments later said that she only saw Blue grab Fuller by the neck and pull her into the alley. J.A. 57-58. Davis refused to say more, but claimed that a girlfriend accompanied her and could corroborate Davis's story. J.A. 57. Davis would not provide her girlfriend's name and instead promised to call Lieutenant Loney with her girlfriend on Monday or bring the girlfriend to a later meeting. *Ibid.* Neither Davis nor the girlfriend ever contacted Lieutenant Loney again. A12320-A12321.

Notes that Goren wrote after the trial indicate his recollection that Davis's statement was "lost in the shuffle," A2308, and he did not learn about it until August 1985, about nine months after the statement

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[5] Although the article describes the author's "six-year crusade" to disprove the prosecution's theory of the Fuller murder, it ends by revealing that Rouse had recently taken a polygraph, whose results led the examiner to believe that he was probably involved in Fuller's death. Charles Turner R. 9, Ex. 1 (App. 100, 111-112).

was given, but 11 weeks before trial, J.A. 264. Goren promptly interviewed Davis on August 8 and 9, 1985. J.A. 266-267. She did not provide any more details, except that the girlfriend she had previously refused to identify was named "Shorty." J.A. 267-268. Police could not locate Shorty. J.A. 268, 271. On October 9, 1985, Blue murdered Davis in a drug dispute unrelated to petitioners' case. J.A. 272-273, 324-327; A1296-A1297; Pet. App. 22a & n.17.

Goren testified that he deliberately decided not to disclose Davis's statement because he found her to be "totally incredible" and he "believed completely and strongly that Ms. Davis had no evidence in this case." J.A. 269-270. Goren described Davis as "playful" when he interviewed her and said that she was "not serious" about her claims. J.A. 271. Detective Gossage recalled that Lieutenant Loney disbelieved Davis when he spoke to her in 1984. A13751-A13752.

Goren also knew that Davis had previously falsely accused Blue of a different murder. J.A. 271-272, 323-324. Prosecutor Behm explained at the hearing that he had first met Davis in February 1984, when he was investigating the unrelated murder of David Hider. J.A. 311-312. Davis told the Hider grand jury that Blue was one of the killers. J.A. 312-314. Based on Davis's testimony, police arrested Blue. J.A. 314. Police soon discovered inaccuracies in Davis's grand jury testimony, and Behm learned from another detective that Davis had falsely accused another individual in yet another murder. As a result, Behm ultimately dropped the charges against Blue for Hider's murder. J.A. 315-321.

ii. James McMillan

At trial, Freeman (who discovered Fuller's body) testified that while he was standing near the garage waiting for the police, he had observed two men run into the alley from Ninth Street and stop near the garage for a few minutes without entering or looking into the garage. He added that one of the men had a bulge in his coat as if he was hiding something. When Officer Ball arrived, he said, the men ran up the cut of the alley toward I Street. Before trial, Harris's counsel unsuccessfully sought the names of those two men, as later identified by Freeman. J.A. 284. After Freeman testified, Harris's counsel raised the issue with the trial court. Saying that she understood from Goren that Freeman had identified the people he saw in the alley, she argued that if Freeman had identified people other than her client, that information must be disclosed under *Brady*. J.A. 63.

Goren responded that he "did not consider [Freeman's] identifications to be *Brady*" information. J.A. 63. He explained that, "the people [Freeman] was talking about were people who were in the alley an hour and a half or so after Ms. Fuller was killed. * * * They never went in the garage. They never had any association with the garage. They ran when the police came into the alley, for whatever reason no one will ever know." *Ibid.* The trial court asked if it had to take up the issue at that moment, and Harris's counsel responded that she would instead call Freeman as a witness in her case and did not mind tabling the issue until then. J.A. 64. Freeman was not recalled to the witness stand in the defense case. J.A. 292.

From Goren's file, petitioners learned that Freeman had identified the men as Gerald Merkerson and James McMillan. J.A. 24, 277. McMillan was 18 years old at the time and lived at 825 Eighth Street, N.E., a house that backs up to a connecting alley. J.A. 290; A1324. A few weeks after Fuller's murder, McMillan assaulted and robbed two middle-aged women in the neighborhood, one on the street and one in an alley. McMillan struck one woman from behind and ran off with her purse. McMillan and another man approached the second woman, one of them punched her in the face, and they ran off with her plastic shopping bag. A1310-A1313, A13128-A13130, A13260-A13261; Pet. App. 18a & n.12.

Goren confirmed at the hearing that he did not disclose to the defense additional witnesses who saw McMillan in the alley just before the police arrived. A13116-A13118; J.A. 280-281. Charnita Speed told the government that when she and Juan Wigfall went into the alley, she saw McMillan and Merkerson there, that McMillan appeared to be putting something under his coat and Merkerson appeared to be stuffing papers under his shirt, and that the pair ran when the police arrived. A13115-A13116; J.A. 26-27. Tylie told the government that when she went into the alley after calling the police, she saw McMillan there, accompanied by two other people. A13117-A13118; J.A. 27.

Petitioners also presented evidence that more than seven years after the trial, on September 15, 1992, McMillan murdered A.M. in an alley behind 526 Eighth Street, N.E., about three blocks from where Fuller was killed. A1325, A2616, A2671, A11678; Pet. App. 18a. McMillan grabbed A.M. while she walked by the alley and dragged her near a parked car, re-

moving and discarding some of her personal items along the way. A2740. McMillan then beat A.M., stripped her naked from the waist down, pushed up her sweater, and sodomized her. A2740-A2741; see Pet. App. 18a-19a.

Consistent with his explanation at trial, Goren stated that he did not disclose the identities of McMillan or Merkerson because they came into the alley after Fuller's body was discovered and did not enter the garage or pay any attention to it. J.A. 287-288. Campbell, who was indicted along with petitioners and pleaded guilty after his trial was severed, see p. 10, *supra*, included McMillan among those present during the group attack in the statement he made to police. A13261-A13262. Campbell's statement was turned over to the defense before trial. *Ibid.*; Pet. App. 18a n.13.

iii. The Watts group

From Goren's case file, petitioners also learned that between 5:30 and 5:45 p.m. on the evening of the murder, a group of people walked through the alley on their way to a liquor store on H Street. J.A. 25, 27, 53-55; A992. Willie Luchie told investigators that a group including Luchie, his niece Jacqueline Watts, Ronald Murphy, and George ("Michael") Jackson walked through the alley that evening, and "as they passed the garage [Luchie] * * * heard several groans." J.A. 25. Goren's notes also state that Luchie "remembers the doors to the garage being closed." *Ibid.* Watts also reported "hear[ing] some moans" while walking through the alley. J.A. 27. Murphy told police that he did not hear anything unusual. J.A. 53. Jackson also heard nothing. A992. Murphy told po-

lice that nobody else was in the alley when the group walked through. J.A. 54.

This group came to the attention of the police when one of Fuller's daughters called police and told them that Watts visited the Fuller house on the day after the murder with a ring that Mr. Fuller recognized as his wife's. J.A. 27; A1371. Watts received the ring from Murphy, *ibid.*, who told police that he bought it on the night of the murder for five dollars from an unknown man and woman during another trip to the liquor store between 8:15 and 8:45 p.m. J.A. 53-54.

Goren believed that any groaning heard by Watts and Luchie fully accorded with the evidence that a large group had attacked Fuller and left her to die. A13113. During the post-conviction hearing, petitioners contacted Luchie, who was convicted in 1986 of second-degree murder of his step-son. See *Luchie* v. *United States*, 610 A.2d 248, 248-249 (D.C. 1992). Petitioners planned to call Luchie as a witness on April 30 and May 2, 2012, but stated that he was sick on both days. A12291, A12511-A12512. Petitioners ultimately gave up on his testimony, stating that Luchie was not necessary. A12511. They did not obtain a statement from him through a deposition or an affidavit.

Petitioners speculated that the groaning heard by Watts and Luchie suggested that a single perpetrator was killing Fuller when the group walked by the garage. In addition, because Freeman had testified that one garage door was open when he found Fuller's body, petitioners argued that Luchie's recollection about the closed doors supported the theory that the killer left the garage after this group passed through. See Joint Br. 37.

iv. Expert testimony

In support of their alternative-perpetrator theory, petitioners introduced expert testimony of Dr. Richard Callery and Larry McCann. Dr. Callery, a medical examiner and forensic pathologist, opined that Fuller's injuries were more likely caused by one to three assailants based on the number and location of her wounds. A12206-A12240. Dr. Callery agreed, however, with Dr. Bray (the 1985 medical examiner) that it was impossible to say how many people attacked Fuller. A12240.

McCann, a crime scene reconstruction expert, added his view that Fuller was more likely murdered by a single offender because, *inter alia*, multiple offenders would have engaged in a "frenzied attack" resulting in stretching, tearing, and casting away her clothing. A12446-A12447; see also A12448, A12459 (opining that lack of abrasions on Fuller's ankles and wrists and the lack of multiple sexual assaults suggests a smaller group of assailants). McCann did not dispute, however, Dr. Bray's opinion at trial that multiple perpetrators could have attacked Fuller and that additional bruises on her body might not yet have appeared. A12466-A12472.

b. Additional impeachment information

i. Kaye Porter's lie about Alston's confession

During her first interview with homicide detectives, Eleby revealed that Alston had admitted to her that he was involved in robbing Fuller. A12943-A12945, A13589, A13890, A13977. Porter, who was present during this interview, agreed that she had also heard Alston's statement. J.A. 258, 298; A12943-A12945, A13589, A13891, A13977. Goren's file contains notes stating that when Porter came in later to talk to inves-

tigators, she told them that "she did not recall being in the car and hearing Calvin Alston say anything about the killing or a robbery," but "just went alon[g] with what [Eleby] said." J.A. 25-26; see J.A. 259, 298; A1004, A13589, A13891, A13977. Eleby likewise admitted to police that she had lied about Porter being present and had asked Porter to lie to support her. J.A. 299-300; A13278. Porter testified before the grand jury in August 1985, but she was not asked about this previous lie. J.A. 260-261.

Goren testified that his failure to disclose Porter's false claim was inadvertent. J.A. 260-261. He explained that although he typically would have asked Porter to admit to the earlier lie during her grand jury testimony, he likely overlooked it because Porter did not testify before the grand jury until eight months later. *Ibid.*

ii. Eleby's PCP use

A note in Goren's case file stated that Eleby "says she was smoking loveboat [*i.e.*, PCP] that night photos viewed on 1/9/85." A1004.

iii. Linda Jacobs

Goren's case file described an interview where Detective Sanchez-Serrano "question[ed] [Linda Jacobs] hard" after she denied knowing anything about the crime while also insisting that Smith and Christopher Turner "didn't have anything to do with the murder." A1009. At the hearing, Goren recalled that Sanchez-Serrano repeatedly challenged her, in a raised voice, "[h]ow do you know that?" and slapped his hand on a desk until she said, "Because I was there." A2298-A2299, A2479-A2480. Goren's notes further state that after Jacobs told them about what

she saw, she "tried to back out of telling us" and that, in subsequent interviews, she "vacil[l]ated back and forth." A1009.

iv. Interview with Aunt Barbara

Maurice Thomas testified at trial that, after he observed the attack on Fuller, he ran home and told his Aunt Barbara what he had seen. An entry in Goren's notes states that Aunt Barbara "(whose real name is Dorothy Jean Harris, and who we had talked to before) does not recall Maurice ever telling her anything such as this." A1010; see J.A. 295-296. Goren concluded that Aunt Barbara was "a bit of an alcoholic," A1010, and the government did not call her at trial. The defense made the same choice, even though Aunt Barbara's name and whereabouts were known and the trial court offered to hold the case while defense counsel interviewed her. A10574-A10576. Goren confirmed that he did not disclose this statement from Aunt Barbara to the defense, A13163, but that defense counsel nevertheless had been provided with Aunt Barbara's true name and address, J.A. 297.

E. The D.C. Superior Court's Findings

The D.C. Superior Court denied petitioners' post-conviction motions. Pet. App. 81a-131a.

1. The trial court rejected Yarborough's claims that police forced him to sign and initial a written statement without letting him read it and that his videotaped statement was the result of police abuse and coaching. Pet. App. 97a-101a. The court found the videotaped statement "was not the statement of a helpless mentally vulnerable young man being fed facts by the police and parroting them back to please his interrogators; it was the voluntary admission of a

conniving youthful offender trying to distance himself as far as possible from the crime while not denying that he was there, which he assumed the police already knew." *Id.* at 98a. The court concluded that Yarborough's hearing testimony was "patently incredible" and that Goren and the detectives had persuasively denied Yarborough's "outlandish allegations" of abuse. *Id.* at 98a, 100a.

2. The trial court rejected petitioners' actual-innocence claims. Pet. App. 101a-111a.

i. The trial court found that "the recantations of Calvin Alston and Harry Bennett are not worthy of belief." Pet. App. 103a. After considering the entire record, including the demeanor of Alston and Bennett at the post-conviction hearing and in their videotaped statements, the court found that "the current testimony of Alston and Bennett that they were not at 8th and H Streets on October 1, 1984, and that they were forced by the police to say they were there" was "nothing short of preposterous." *Ibid.* The court explained that "[t]he scene in the alley on October 1, 1984, was crowded and chaotic. Alston and Bennett may have gotten some facts wrong and may have left certain things out or distorted the truth to minimize their own involvement or to protect others, but the basic facts implicating these petitioners and describing a crime perpetrated by a large group were corroborated by too many other witnesses not to be believed." *Ibid.*

The hearing testimony of Jacobs, the trial court found, was "even less helpful to petitioners than Alston and Bennett." Pet. App. 104a. The court concluded that Jacobs's "insistence that she lied coupled with her inability to remember anything that she lied

about makes her current testimony relatively useless." *Id.* at 107a. The court also noted that, "[c]uriously, * * * whenever she was asked if she saw any of the attack or the act of sodomy" against Fuller, "Jacobs broke down sobbing just the way she did when she was confronted with that visual image at trial." *Ibid.*

Finally, the trial court explained that petitioners were unable to salvage the "bad turn of events" when Montgomery disavowed the parts of his affidavit that purportedly recanted his trial testimony and instead reaffirmed that his testimony was true. Pet. App. 109a.

ii. The trial court found that petitioners' expert testimony was neither newly discovered nor particularly persuasive. Pet. App. 110a-112a n.14. The court noted that neither Callery nor McCann "could definitively state that Mrs. Fuller was attacked by one to three individuals as opposed to a larger group," and it found that the evidence "does not begin to demonstrate that the petitioners are 'actually innocent.'" *Id.* at 110a-112a & n.14. The court further noted that "[p]etitioners could have presented testimony from experts similar to Dr. Callery and Mr. McCann at trial." *Id.* at 111a n.14.

3. Finally, the trial court rejected petitioners' *Brady* claims, Pet. App. 112a-129a, finding that "none of the undisclosed information was material. *Id.* at 130a.

a. The trial court acknowledged that Davis's statement implicating Blue was exculpatory. Pet. App. 116a-117a. Nevertheless, the court concluded that Davis's claim was not material under *Brady* because it "was thoroughly discredited" and it therefore "d[id] not undermine the court's confidence in the outcome of the trial." *Id.* at 117a. "For Ms. Davis'

account to be true," the court explained, "a jury would have to believe that James Blue, acting alone, attacked and murdered Mrs. Fuller, in the face of numerous eyewitness accounts and other evidence proving that crimes were committed by a large group of young men acting in concert." *Ibid.*

The trial court noted that Davis's statement would almost certainly have been inadmissible at trial because Davis died before trial and petitioners had identified no applicable hearsay exception. Pet. App. 117a-118a n.18. The court concluded, however, that even if Davis had provided testimony, "any reasonable jury, in light of all the evidence, would surely have rejected it." *Id.* at 117a-118a. The court noted that "[n]ot one of the approximately 400 other witnesses interviewed by the government mentioned James Blue as a possible perpetrator, either alone or with others." *Id.* at 118a. Davis's statement was also "riddled with problems," and if the statement had been admitted, the jury would have heard that Davis had previously leveled a different false accusation of murder against Blue. *Id.* at 118a-120a. The court acknowledged that the prosecutor's duty to turn over evidence favorable to the defense is not excused simply because the prosecutor does not believe the evidence, but the court also found it "understandable why, in context, this careful and fair-minded prosecutor did not believe this piece of evidence and did not consider it material." *Id.* at 120a.

b. The trial court found that McMillan's identity was "arguably not even favorable to the accused" because McMillan, who lived nearby, was only seen in the alley after the attack on Fuller. Pet. App. 123a. But in any event, the court concluded that the infor-

mation was "definitely not material" because even if McMillan was present during the murder or had the murder weapon under his coat, "it would not prove anything about the guilt of these petitioners." *Ibid.* "For the 'McMillan evidence' to be material," the court explained, "he would have had to have committed the crime by himself or with Merkerson to the exclusion of the petitioners, and that possibility flies in the face of all the evidence." *Ibid.* The court acknowledged that defense counsel could have tried to exploit "[t]he coincidence of McMillan's presence in the alley and his attacks on other women in that neighborhood around the same time." *Ibid.* But, the court concluded, "it does not override the overwhelming evidence of the guilt of these petitioners or undermine the court's confidence in the jury's determination of their guilt at trial." *Id.* at 123a-124a.

c. With respect to the potential impeachment information, the trial court concluded that "[n]one of these non-disclosures, separately or together, is material under *Brady*." Pet. App. 124a; see *id.* at 124a-129a. The court saw "virtually no chance" that Porter's admission that she lied at Eleby's request would have mattered because "Porter was a relatively minor witness against one defendant [Catlett], and the cross examination of Eleby about other lies and inconsistent statements, all of which were disclosed, was very extensive." *Id.* at 125a. The court further concluded that "Eleby's use of PCP was the subject of cross examination at trial, and the government's failure to disclose * * * the extent of her PCP use was not material under *Brady*." *Id.* at 127a.

The trial court reached the same conclusion about the information that Jacobs had vacillated about

whether she had been in the alley. This "was not material given all that the government did disclose about her inconsistent statements, her extensive cross examination at trial based on her inconsistent statements, and the jury's up close opportunity to observe her demeanor." Pet. App. 127a. The court explained that, "[i]f the jury concluded that [Jacobs] was an eyewitness" to the attack, "there is no chance it would have concluded otherwise if it learned that on more than one occasion she had denied that she was there." *Ibid.*

The trial court further found that the undisclosed statement of Aunt Barbara was not material because Maurice Thomas had testified at trial that she told him to "forget" what he had seen. Pet. App. 126a. Accordingly, even if Thomas had been impeached with Aunt Barbara's statement to police that she did not recall Thomas telling her about an attack, Thomas had testified convincingly at trial, he was cross-examined extensively, and "no juror would have concluded that he was making it all up." *Ibid.*

d. The trial court concluded that "none of the undisclosed information," viewed separately or cumulatively, "would have made any difference in the outcome of the trial." Pet. App. 130a. The court explained that "[i]t is not enough to show that the defendants could have used the undisclosed evidence to construct a 'counter-narrative' (or, as here, two counter-narratives that were mutually exclusive of each other), which could have been supported by a possible reconstruction of the physical evidence that ignores all of the eyewitness testimony." *Ibid.* The court reiterated that, for the non-disclosed evidence to be material under *Brady*, petitioners must show a reasonable

probability that the undisclosed evidence would have produced a different verdict. *Ibid.* "Under that standard," the court concluded, "based on the entire voluminous record in this case, petitioners' *Brady* claims * * * must fail." *Ibid.*

F. The D.C. Court of Appeals Opinion

The court of appeals affirmed. Pet. App. 1a-78a.

1. The court of appeals found that the trial court did not abuse its discretion in denying petitioners' claims of actual innocence. Pet. App. 54a-62a. It saw "no basis on which to overturn the [trial] judge's finding that the recantations [of Alston and Bennett] were incredible," and "no error in [its] finding that the purported recantations of Montgomery and Jacobs were worthless." *Id.* at 59a-60a. As for petitioners' expert testimony purportedly showing that Fuller was attacked by one to three individuals, the court of appeals agreed with the trial court that petitioners "could have presented such testimony at their trial," and that it did not establish actual innocence. *Id.* at 61a.

2. The court of appeals further concluded that Yarborough's counsel did not render ineffective assistance in moving to suppress his videotaped statement. Pet. App. 62a-78a. After exhaustively reviewing the circumstances of Yarborough's statements and the evidence of his cognitive impairments, the court concluded that Yarborough's videotaped statement was not the result of police coaching or coercion. *Id.* at 76a-77a.

3. With respect to petitioners' *Brady* claims, the court of appeals expressed doubt about whether some of the evidence at issue was even favorable to petitioners. Pet. App. 28a. The court assumed, however, that all information identified by petitioners was fa-

vorable to the defense and held that the information was not material under *Brady*. *Id.* at 28a, 31a-54a.

a. The court of appeals found "reason to doubt that Ammie Davis's accusation of James Blue would have carried significant weight with the jury, given her lack of credibility and the complete absence of other evidence associating Blue in any way with Fuller's murder." Pet. App. 37a. But the court found it unnecessary to examine that question, because Davis's statement "would have been excluded at [petitioners'] trial pursuant to a routine and uncontroversial application of the basic rule against hearsay." *Id.* at 41a; see *id.* at 37a-43a & n.73.

The court of appeals further concluded that petitioners "have not demonstrated any likelihood that they would have located and obtained helpful testimony from the girlfriend Davis mentioned, or that they would have discovered any other admissible evidence implicating Blue in Fuller's murder." Pet. App. 38a; see *id.* at 44a-45a. Further, if Davis's statement had been admitted to show that the government's investigation was not diligent, the impact would have been "negligible" because the investigation was "quite a thorough one overall." *Id.* at 43a-44a.

b. The court of appeals placed all of the undisclosed impeachment evidence in the same category. Pet. App. 45a-47a. Although Porter's false claim about hearing Alston confess to Eleby could have been used to impeach Porter's testimony against Catlett, Porter was already impeached with contrary grand jury testimony, and the other evidence against Catlett was very strong. *Id.* at 45a-46a (summarizing evidence). Likewise, with respect to Eleby, "additional impeachment [of her] would [not] have made a differ-

ence to the jury's assessment of [her] credibility," and additional evidence of her PCP use would have been "of little consequence." *Id.* at 46a. Furthermore, Aunt Barbara's failure to recall Maurice Thomas's recounting the attack on Fuller "was unlikely to have discredited Thomas in any significant way," because, *inter alia*, having urged Thomas not to report the assault, Aunt Barbara had "every reason to deny their conversation when she spoke to the police." *Id.* at 47a. In a footnote, the court rejected petitioners' "somewhat vague[]" claim of undisclosed impeachment evidence for Jacobs, concluding that the defense knew that Jacobs had denied witnessing the acts because she was asked about it on cross-examination. *Id.* at 22a n.18.

c. The court of appeals concluded that the Watts and Luchie statements and McMillan's identity had "potential weight in a cumulative materiality analysis" in that they could have been used to construct a defense theory that Fuller was being killed behind closed garage doors by one or two perpetrators between 5:30 and 5:45 p.m., and then the killer or killers left a garage door open when they left. Pet. App. 31a-32a. The court noted that information McMillan had robbed two women after Fuller's murder was potentially admissible at trial and relevant. *Id.* at 33a-36a. As to the murder McMillan committed in 1992, however, the court held that "[a] *Brady* violation cannot be predicated on the government's failure to * * * disclose evidence that does not yet exist" and, therefore, the 1992 murder "ha[d] no bearing on the question of the materiality of any evidence that the government actually did withhold." *Id.* at 36a-37a.

The court of appeals next analyzed the cumulative materiality of all undisclosed evidence. Pet. App. 48a-

54a. Having already found that the undisclosed impeachment evidence and the limited use that petitioners could have made of Davis's statement had only a negligible impact, the court focused on petitioners' claim that the Watts and Luchie statements and the McMillan information would have enabled them to present an alternative single-perpetrator theory of the crime. *Ibid.* The court emphasized the strength of the government's evidence, observing that several eyewitnesses, including two participants who pleaded guilty to homicide, had implicated petitioners in a group attack, and that their testimony was corroborated by admissions some petitioners had made. *Id.* at 48a-52a. Moreover, no trial witness had disputed this "overall description of how the crime was committed." *Id.* at 49a.

The court of appeals concluded that the Watts and Luchie statements and the McMillan information failed to "provide substantial support" for "any theory that excluded [petitioners] as the perpetrators." Pet. App. 50a. That Watts and Luchie heard groans (but did not see any activity or hear anything else) did not suggest that the assault was still occurring at 5:30 p.m. and was "entirely consistent" with the government's evidence. *Ibid.* As for Luchie's observation that both doors of the garage were closed shortly before Freeman found one open, that claim "surely would not have been enough to turn a jury that found the government's witnesses credible, as this jury did," given other possible explanations for the discrepancy. *Ibid.*

The court of appeals concluded that a theory that McMillan committed the crime alone (or with one or two others) would have been "exceedingly implausible

and difficult for the jury to accept." Pet. App. 51a-52a. In addition to "the dearth of any evidence inculpating [McMillan]," such a theory would have required the jury to conclude that "all the government witnesses were lying or mistaken about every defendant at trial" and that Alston and Bennett had either pleaded guilty to homicide while innocent, or admitted their own culpability in a small-group attack (and falsely accused petitioners) while inexplicably shielding McMillan. *Id.* at 50a-51a.

The court of appeals clarified that its "conclusion [wa]s the same for each [petitioner] individually." Pet. App. 52a. Although the jury took longer to convict Overton and Christopher Turner, the court explained that all petitioners "are similarly situated" on the theory of a single-perpetrator attack. *Id.* at 53a. In sum, the court concluded that "[t]he withheld evidence cannot 'reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Id.* at 54a (quoting *Kyles* v. *Whitley*, 514 U.S. 419, 435 (1995)).

SUMMARY OF ARGUMENT

The government complied with its obligations under *Brady* v. *Maryland*, 373 U.S. 83 (1963). Nondisclosures violate *Brady* only when withheld information is both favorable and material. The undisclosed information here does not meet that standard; it does not undermine confidence in petitioners' guilt of the brutal slaying of Catherine Fuller. Petitioners received a fair trial, and the verdicts should stand.

A. Petitioners' principal claim is that undisclosed evidence about James McMillan, and a group of people who walked past the garage where Fuller died, would have allowed petitioners to construct an "alternative

perpetrator" defense, capable of competing with the evidence of a group attack described by multiple government witnesses. But evidence of McMillan's identity would not have affected the outcome of petitioners' trial.

Initially, the evidence about McMillan fails to place him at the scene of Fuller's murder at the time it occurred. Petitioners rely on evidence that McMillan appeared in the public alley near the garage *after* the discovery of Fuller's body. But nobody placed him in the garage or had him participating in a solo or small-group attack.

Beyond that, petitioners had ample opportunity and incentive to construct such an alternative-perpetrator defense at trial, but did not pursue it. They knew that two individuals ran into the alley and stood near the garage, that one had something hidden in his coat, and that both ran from police. But petitioners did not develop a theory based on that evidence. And knowing that McMillan later robbed two middle-aged women in the vicinity would add little. Whatever that revealed about McMillan's violent tendencies, it did nothing to suggest that he attacked Fuller alone or with a single accomplice. Nor would it have countered the government's proof, from multiple sources including two cooperating participants, of a group attack launched by petitioners.

Petitioners are not helped by evidence that two people heard groaning in the garage at about 5:30 to 5:45 p.m. and one person saw its doors closed. That information does nothing to suggest that Fuller's attack was ongoing or that McMillan was inside. The brutality of the assault on Fuller makes soft groaning an implausible response to an ongoing attack. And it

is sheer speculation that McMillan was assaulting her at that time.

The expert testimony that petitioners offered below cannot bridge the evidentiary gap. It is highly unlikely that petitioners would even have developed that evidence at trial if they had known McMillan's identity. Petitioners had far more plausible suspects for a small-group attack—Alston and Bennett, who admitted culpability—yet did not present crime-scene experts to cast doubt on a large group attack. In any event, petitioners' experts admitted that they could not exclude a group attack based on the physical evidence.

Nor is it plausible that petitioners would have embraced a "McMillan did it alone" theory. Given the multiple witnesses describing the group attack, the damning admissions by several petitioners, and the incentives for each to disassociate himself from the group attack, a joint defense was entirely improbable. This is especially true for Overton, who in closing argument embraced Maurice Thomas as an "honest kid" with "no ax[e] to grind," who happened to walk by the alley "when the very crime itself is proceeding" and "sees the very beginnings of the murder in progress."

Finally, petitioners cannot rely on McMillan's murder of A.M. in 1992 to support a *Brady* claim. A murder committed years after trial has no relevance to the government's disclosure obligations at trial.

Overton alone suggests that Ammie Davis's statement that James Blue murdered Fuller provided another third-party perpetrator defense. But Davis was dead by the time of trial, her statement was inadmissible, and her cursory, shifting, and uncorroborated accusation lacked any credibility. It was not material.

B. Petitioners' reliance on undisclosed impeachment evidence also fails. The delay in transmitting Davis's accusation against Blue would not have undercut the diligence or thoroughness of the investigation —the prosecution did investigate it well before trial. Information that Carrie Eleby was high on PCP when she met with investigators would have been cumulative, given her thorough impeachment. Kaye Porter's lie to the police about overhearing Alston admit to his involvement in the attack on Fuller, and Eleby's prompting of the lie, would have done little, given that Alston himself corroborated Eleby's statement.

Petitioners rely on the manner in which a detective questioned Linda Jacobs as undisclosed impeachment evidence. But given Jacobs's vacillation and initial concealment of some of petitioners' roles, that evidence would have had negligible effect. So too would the undisclosed statement of Maurice Thomas's Aunt Barbara that she did not recall his report of the attack. Given Thomas's testimony that his aunt told him not to tell anyone what he saw, the jury would have given little weight to her statement.

C. The cumulative consideration of the undisclosed evidence does not change the conclusion. The additional impeachment evidence would have had little incremental effect, and, for the reasons described above, would not have undermined the government's case. And the undisclosed McMillan evidence does not undermine confidence in the trial's outcome.

Petitioners weave a speculative theory that McMillan alone, or perhaps with one accomplice, killed Fuller. This theory would be material only if it "put the whole case in such a different light as to undermine confidence in the verdict." *Kyles* v. *Whitley*, 514

U.S. 419, 435 (1995). But to accept that theory, the jury would have had to reject eyewitness testimony from two cooperators who participated in the attack, the credible testimony of Montgomery on the attack's origins in the park, Maurice Thomas's testimony describing the attack in the alley, and the testimony of Eleby and Jacobs about seeing the brutal sodomy in the garage. It would also have had to discard the multiple admissions by petitioners to third parties, including Yarborough's videotaped statement describing a group attack; Catlett's statement, which Thomas overheard, explaining that Fuller was killed because she recognized an assailant; Catlett's statement that he only kicked Fuller, while someone else "stuck the pole up in her"; and Rouse's admission of doing the "worst thing" to the lady in the alley. It also would have had to set aside Overton's and Christopher Turner's incriminating conversation overheard in jail.

If the jury learned that McMillan was seen in the alley after Fuller's death; that groans were heard in the garage at about 5:30 to 5:45 p.m.; that a garage door was closed, but later opened; and that McMillan committed nearby robberies of middle-aged woman, it would not have had reason to doubt the government's case. The "mere possibility" of an alternative-perpetrator defense is insufficient to establish a *Brady* violation, *United States* v. *Agurs*, 427 U.S. 97, 109-110 (1976), and petitioners fare no better than that.

D. Overton's individual *Brady* claim equally lacks merit. Suggesting that Eleby was the pivotal witness against him, Overton emphasizes the additional impeachment he could have conducted based on her PCP use and her prompting Porter to lie. But Overton overlooks substantial and compelling evidence against

him from Melvin Montgomery, who saw him in the park pointing toward Fuller, and his incriminating conversation with Christopher Turner in jail. He also ignores the manner in which his alibi was discredited at trial. Overton, like the joint petitioners, provides nothing that undermines confidence in the jury's verdict.

ARGUMENT

NO REASONABLE PROBABILITY EXISTS THAT THE OUTCOME OF PETITIONERS' TRIAL WOULD HAVE BEEN DIFFERENT IF THE INFORMATION IDENTIFIED BY PETITIONERS HAD BEEN DISCLOSED TO THE DEFENSE BEFORE TRIAL

In *Brady* v. *Maryland*, 373 U.S. 83 (1963), this Court held that the Due Process Clause of the Fifth Amendment requires the government to disclose favorable evidence to the accused where such evidence is "material" either to guilt or to punishment. *Id.* at 87. Favorable evidence includes not only evidence that tends to exculpate the accused, but also evidence that is useful to impeach the credibility of a government witness. *Giglio* v. *United States*, 405 U.S. 150, 154 (1972); see *Smith* v. *Cain*, 132 S. Ct. 627, 630 (2012). The failure to disclose material, favorable evidence violates due process "irrespective of the good faith or bad faith of the prosecution," *Brady*, 373 U.S. at 87, and without regard to whether the evidence was actually known to the individual prosecutor, or merely to "others acting on the government's behalf in the case, including the police," *Kyles* v. *Whitley*, 514 U.S. 419, 437 (1995).

A *Brady* violation entails three showings: (1) the information not disclosed must be "favorable to the accused, either because it is exculpatory * * * or

impeaching," (2) the information must have been suppressed or withheld by the prosecution, and (3) the information must be "material" to guilt or punishment. *Strickler* v. *Greene*, 527 U.S. 263, 281-282 (1999). The "mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *United States* v. *Agurs*, 427 U.S. 97, 109-110 (1976). Evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States* v. *Bagley*, 473 U.S. 667, 682 (1985); see *Cone* v. *Bell*, 556 U.S. 449, 469-470 (2009). That inquiry requires the Court to evaluate whether favorable evidence not disclosed by the prosecution "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 434-435.

In the post-conviction hearing, petitioners claimed actual innocence based on recantations of trial testimony that the trial court concluded were "nothing short of preposterous." Pet. App. 103a. The court further rejected Yarborough's "outlandish allegations" of police abuse and concluded that petitioners' claims that police manipulated people into implicating themselves and others in a police-created story about Fuller's murder were credibly denied by the detectives and prosecutors who conducted the investigation. *Id.* at 100a; see *id.* at 60a n.96. Petitioners' remaining claim in this Court arises only under *Brady*; they do not challenge the rejection below of the recantations or Yarborough's testimony.

Petitioners need not show that a different outcome is more likely than not if the information they have identified from Goren's case file had been disclosed to the defense, but they must show that the undisclosed evidence undermines confidence in the outcome. *Kyles*, 514 U.S. at 434. That inquiry requires the Court to consider the entire case presented by the prosecution at trial, including:

- Montgomery's eyewitness testimony describing how plans for the attack unfolded in the park
- Alston and Bennett's confessions to the crime and testimony that they participated in a group attack on Fuller with petitioners
- The testimony of three eyewitnesses—Thomas, Eleby, and Jacobs—who corroborated Alston and Bennett's description of a group attack in the alley
- Yarborough's videotaped statement describing a group attack in the alley
- Incriminating statements made by several of the petitioners after the crime, and
- The severely discredited alibis offered by the defense.

Against that backdrop, no reasonable probability exists that the result of petitioners' trial would have been different if the information that forms the basis for their *Brady* claim had been disclosed before trial. *Bagley*, 473 U.S. at 682. Examining petitioners' alternative-perpetrator evidence and their additional impeachment evidence, first separately and then cumulatively, the undisclosed information cannot reasonably be said to "put the whole case in such a differ-

ent light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435.

A. No Reasonable Probability Exists That Presentation Of An Alternative-Perpetrator Defense Would Have Changed The Outcome Of Petitioners' Trial

All petitioners claim that McMillan's identity would have catalyzed a viable third-party perpetrator defense that would have altered the trial narrative. Overton alone makes the same claim for James Blue. Neither of those claims can be reconciled with the full trial record.

1. Petitioners' presentation of James McMillan as an alternative perpetrator could not plausibly have affected the outcome

Petitioners contend (Joint Br. 33-44; Overton Br. 34-40) that *Brady* required the government to disclose that witnesses had identified James McMillan as one of the men seen running into the alley from Ninth Street shortly before police arrived and hiding something under his coat, and then fleeing when police appeared. They contend that this information, combined with groans heard by Watts and Luchie and expert testimony claiming that the attack was committed by a small number of people, would have enabled them to present a convincing defense that McMillan—who by the time of petitioners' trial had been imprisoned for committing two non-fatal robberies of women in the same neighborhood—had killed Fuller by himself or maybe with an accomplice. Petitioners' contention fails for multiple reasons.

a. Initially, McMillan's identity and the observations of Watts and Luchie provide scant reason to believe that he—alone or with Merkerson—killed

Fuller. No witness saw McMillan target Fuller before the attack; no witness saw him in the garage—or out of it—attacking Fuller by himself or with an accomplice; and no witness saw him with any items obtained from the robbery.[6] He was seen running into the alley and standing outside of the garage after the discovery of Fuller's body. Any link between McMillan and a single-perpetrator attack on Fuller is entirely speculative.

Petitioners' McMillan-based theory requires stringing together inference upon strained inference. A jury would have to surmise that he returned to the garage (but did not enter) because he previously killed Fuller there (although no one saw this). The information provided by Watts and Luchie would not have helped. That Watts and Luchie heard groaning in the garage (which others with them did not hear) hardly suggests that an attack was ongoing at that time. Goren explained that if Watts and Luchie heard groans between 5:30 and 5:45 p.m., that would mean the attack was over and Fuller was groaning because of her injuries. A13113. Fuller left her home after 4:30 p.m. and was attacked not long after in a "fast-moving

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[6] McMillan and others who were not charged were alleged by some to have been part of the group attack with petitioners, but that information was disclosed to defendants through Campbell's statement. See p. 31, *supra*. Bennett, however, knew McMillan and confirmed that he was not present, and the government concluded that it did not have enough information to charge him. J.A. 277, 280, 294-295; A1113-A1114; Pet. App. 51a, 122a n.21. In any event, information that McMillan participated in the group attack is not exculpatory as to petitioners. See *Strickler*, 527 U.S. at 292 ("[T]he strong evidence that Henderson was a killer is entirely consistent with the conclusion that petitioner was also an actual participant in the killing.").

event." Pet. App. 50a. The vicious nature of the attack on Fuller makes it incredible that groans or moans would be the extent of the victim's audible response. And Luchie's observation that the garage door was closed and Freeman's that it was partially open does nothing to put McMillan in the garage attacking her.

Against these speculative claims, a defense based on McMillan would have to compete with the numerous eyewitnesses who corroborated that Fuller was killed in a group attack launched by petitioners earlier—including testimony by two participants who pleaded guilty. Nothing in the McMillan evidence, or the Watts and Luchie information, contradicted or undermined the group attack that these witnesses recounted, or explained the incriminating admissions of some petitioners. McMillan's identity was not material in the context of this trial.

b. A powerful indication that disclosure of McMillan's identity would not have resulted in a plausible alternative-perpetrator defense is that petitioners did not pursue that form of defense, even though virtually all of the evidence supporting it was introduced at trial.

Joint petitioners contend (Br. 34) that McMillan's behavior at the crime scene was "self-evidently suspicious" because he had been seen throughout the day walking up and down H Street, he and another man ran into the alley after Fuller's body was discovered and stopped near the garage, McMillan appeared to be hiding something under his coat, and the men ran out of the alley when police arrived. They speculate (*ibid.*) that "[a] jury would have seen this behavior as strongly tending to inculpate McMillan" and that "it

may well have surmised that McMillan had the object used to assault Mrs. Fuller under his jacket." But, aside from McMillan's identity, petitioners and the jury knew all of this information through Freeman's testimony at trial. See pp. 15-16, *supra*. Petitioners nonetheless never suggested that those two suspicious men were potential alternative perpetrators. Harris's counsel was interested in the information to make the point that neither man was identified as her client, but she did not pursue the *Brady* issue at trial after bringing it to the court's attention. See p. 29, *supra*.

Petitioners contend (Joint Br. 33-34; Overton Br. 35) that McMillan's robbery of two other women a few weeks later would have made the difference in the jury's eyes. See A13134 (defense counsel explaining at post-conviction hearing that the defense would have been "it's not these defendants, it's Mr. McMillan, he's a far more likely suspect, he's committed other assaults in the area"); Overton Br. 35 (McMillan evidence was significant because he was "a known criminal who had violently assaulted other women in the same neighborhood") (emphasis omitted).[7] But McMil-

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[7] Notably, McMillan's criminal history was not very different from multiple petitioners, many of whom had convictions for robberies, including robberies of women. A9601, A11527-A11529 (Charles Turner had four prior convictions and numerous arrests); A11446-A11449 (Catlett had a prior conviction for armed robbery of a 55-year-old woman at knifepoint and assault with intent to commit robbery); A11500 (by sentencing, Overton had three robbery convictions and an outstanding armed robbery warrant); A11472-A11474 (Webb's juvenile record included conviction for pulling a woman into an alley and robbing her); A11571-A11572 (Smith was awaiting trial on a different robbery case at sentencing); A11620 (at time of Fuller's murder, Yarborough was on probation for assault with a dangerous weapon and had earlier

lan's crimes against other women, in other factual contexts, would not have undercut the strong evidence of the group attack witnessed by many and participated in by two government witnesses. Nor would it explain the incriminating admissions by Catlett, Rouse, Overton, Christopher Turner, and Yarborough. And it would not even have placed McMillan in the garage, in a solo attack on Fuller, or put any robbery proceeds in his hands. The evidence would have had little force in undermining the government's case.

c. Petitioners contend (Joint Br. 35-37; Overton Br. 35-40) that their alternative-perpetrator theory would have been bolstered with information that two members of a group that walked through the alley between 5:30 and 5:45 p.m. heard groans coming from the garage, and one member of that group (Luchie) recalled the garage doors being closed. Asserting repeatedly (Joint Br. 3, 10, 27, 35, 51) that the time of death was 5:30 p.m.,[8] joint petitioners contend (Br. 36) that the "natural inference" from those observations "is that the group heard Mrs. Fuller being attacked." From that premise, petitioners reason (*id.* at 36, 51) that because a large group could not have been inside of the garage with the doors closed, the observations of the group walking through the alley "directly suggest that Mrs. Fuller was not killed by a group." See Overton Br. 2 (statements of Watts group "suggested the government's large-group theory * * * was

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been arrested for attempting (along with others) to rob a man by force).

[8] In fact, Dr. Bray, who conducted the autopsy, testified that Fuller had been dead for perhaps two or three hours before his examination, and thus the time of death could have been about 5:30 p.m. "give or take an hour either way." A7976, A7978.

incorrect"). There are several glaring problems with that argument.

First, that two members of a four-or-more-person group heard groans coming from the garage when they walked past between 5:30 and 5:45 p.m. does not lead to a "natural inference" that Fuller was being attacked at that moment. The groans were inaudible to at least two members of the group, see J.A. 53; A992 (Murphy and Jackson heard nothing), and it is highly unlikely that an ongoing attack of the type Fuller sustained—including being sodomized with a pipe that pierced the wall of her rectum and left internal injuries along an eleven-inch wound track—A8010-A8019, would have resulted only in faint groans. Any groaning that Watts and Luchie heard is far more consistent with the idea that Fuller lay dying in the garage from her severe injuries than with the idea that her attacker was violently yet silently sodomizing her with a pipe.

Second, petitioners' theory places critical weight on a notation from Goren's notes that Luchie "remembers the doors to the garage being closed." J.A. 25. That evidence lacks detail and was not tested in any hearing. Although petitioners were in contact with Luchie during the post-conviction hearing and represented twice that they would call him as a witness, they stated he was sick and that his testimony was not necessary. A12291, A12551-A12512. The Court is left with a vague discrepancy between a single statement by Luchie and Freeman's testimony, which provides a frail basis for inferring that an attack was ongoing when Luchie passed by and that the real perpetrator left the door open on his way out.

Third, the implausible assumptions required to surmise that Watts and Luchie heard Fuller being attacked only gets petitioners as far as showing that the evidence *could* be viewed as exculpatory. Joint petitioners contend (Br. 36) that the court of appeals' dismissal of the Watts and Luchie observations as carrying little weight were "circular" because the court's analysis "depends on the assumption that Mrs. Fuller died from a group attack." Petitioners note (*ibid.*) that if a court were to suspend that assumption, then "what Watts and Luchie heard is completely consistent with an assault having been in progress." But the court is not required to suspend its consideration of inculpatory evidence (not assumptions) when it analyzes whether undisclosed information is material to petitioners' guilt. The materiality analysis requires the Court to evaluate whether favorable evidence withheld by the prosecution "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435. The court was thus required to evaluate the Watts and Luchie observations in the context of the extensive evidence of a group attack presented at trial.

d. Petitioners further contend (Joint Br. 38-40; Overton Br. 19-21, 39) that, had they known McMillan's identity and the observations of Watts and Luchie, they would have developed "objective crime-scene evidence" showing that the attack was most likely committed by only a few people. That argument does not assist them.

First, petitioners' expert testimony can be weighed in the *Brady* analysis only if petitioners would have actually developed such testimony for use at trial had

they received the undisclosed information. See *United States* v. *Gale*, 314 F.3d 1, 4 (D.C. Cir.) (courts "must consider the non-disclosure dynamically, taking into account the range of predictable impacts on trial strategy"), cert. denied, 540 U.S. 986 (2003); *Davis* v. *State*, 928 So. 2d 1089, 1115 (Fla. 2005) (per curiam) (no *Brady* violation where suppressed statements from witnesses would not have been presented to the jury even if they had been disclosed), cert. denied, 549 U.S. 895 (2006).

The record provides objectively strong reasons to doubt that petitioners would have developed expert testimony supporting their small-group attack theory, even if the McMillan information had been disclosed. As it was, defense counsel already questioned the notion that Fuller died from a large group attack. Smith's counsel told the jury that "the physical impossibility of seventeen people standing around a little woman" should give them pause. A10939. Overton's counsel argued that too many people had been charged. A10816 ("[H]ow many people would the government ask to convict" of one murder?). Charles Turner's counsel suggested that five people participated. A10975. And Rouse's counsel argued the most obvious small-group theory—that Alston and Bennett committed the crime—and noted that the medical examiner could not say how many people caused Fuller's injuries. J.A. 173-179. Nothing about the crime scene was withheld from petitioners. Yet petitioners presented no expert testimony to suggest a small-group attack. Because it is so unlikely that petitioners would have developed their belated expert testimony in support of a different single-perpetrator or small-group theory, it should not be considered in

the *Brady* analysis. See *Morris* v. *Ylst*, 447 F.3d 735, 740-742 (9th Cir. 2006) (failure to disclose a letter that would have revealed a credible, independent witness was not a *Brady* violation where the defendant's lawyers and investigator already had an incentive to speak to the witness and did not do so), cert. denied, 549 U.S. 1125 (2007).

The court of appeals specifically noted (Pet. App. 61a) that this expert testimony could have been presented at trial, in support of a far more likely alternative-perpetrator theory available to petitioners—*i.e.*, that Alston and Bennett committed the crime and implicated petitioners to diffuse responsibility. Petitioners contend (Joint Br. 39 n.12) that this defense would have been "implausible" because Alston and Bennett did not know each other or have criminal histories of assault. But Alston and Bennett *confessed to the crime*. Petitioners' current theory that McMillan was the perpetrator requires the jury to accept the far more implausible scenario that Alston and Bennett both pleaded guilty to homicide without having participated in Fuller's murder, and that other eyewitnesses corroborated those false confessions, while McMillan —by himself or with an accomplice—was the "real" perpetrator.

In any event, even if the Court concludes that the expert testimony would have been developed as a result of the undisclosed McMillan information, the testimony that petitioners presented at the post-conviction hearing was not "unrebutted" (Joint Br. 38) and contributes little to petitioners' *Brady* claim. On cross-examination, both experts admitted that they could not dispute the opinion of Dr. Bray, who conducted the autopsy in 1985 and concluded that it was

not possible to tell how many people attacked Fuller. See pp. 16, 33, *supra*. The trial court specifically found that petitioners' expert testimony was not persuasive in that neither expert "could definitively state that Mrs. Fuller was attacked by one to three individuals as opposed to a larger group." Pet. App. 111a n.14.

e. Petitioners suggest that, armed with the undisclosed evidence, they would have joined hands in a common "alternative perpetrator" defense that directly challenged the government's theory of the case at trial, rather than accepting the existence of a group attack and saying "but not me." Overton Br. 37-38; Joint Br. 14; see Nat'l Ass'n of Criminal Def. Lawyers Amicus Br. 5-12. In fact, the prospect of such a unified defense was nil. Numerous witnesses—including two cooperators—testified that a large group attacked Fuller, so each defendant had a strong incentive to extricate himself from that group.

Moreover, the government's evidence "firmly impaled" Rouse, Overton Direct Appeal Br. 25; see Webb Direct Appeal Br. 17 (testimony of government witnesses "left no doubt about Rouse's participation in the murder of Mrs. Fuller"), and Yarborough's videotaped statement likewise made his conviction nearly inevitable (A715-A717). Given that reality, no other defendant would have tied his own prospects for acquittal to any theory positing the innocence of those two. Indeed, the claim that all defendants would have joined together in fingering McMillan is particularly unconvincing as to Overton. Overton's experienced trial counsel deemed the possibility that "the alley was pretty well deserted at the time of the murder" to be "absurd." Overton Direct Appeal Br. 25. And even

now, when petitioners are trying to persuade this Court that McMillan's identity would have fundamentally changed the trial by allowing petitioners to present "an overarching, unified defense" that McMillan killed Fuller (Joint Br. 15), Overton cannot bring himself to criticize Maurice Thomas—an eyewitness to a group attack who did not see Overton in the alley. Compare Joint Br. 13, 48-49 (challenging various aspects of Thomas's trial testimony), with Overton Br. 33 (noting without dispute the government's description of Thomas as "an important eyewitness with no apparent bias or motive to fabricate" and declining to join in the argument that Aunt Barbara's statement to police was *Brady* material) (citation omitted). Indeed, at trial, Overton embraced Thomas as an "honest kid," with "no ax[e] to grind"—who happened to walk by the alley "when the very crime itself is proceeding" and "sees the very beginnings of the murder in progress." A10817-A10819.

f. Finally, joint petitioners note (Joint Br. 49-50) that McMillan committed a "disturbingly similar murder" in 1992, and they contend that this evidence "confirms" the materiality of the prosecution's non-disclosure of McMillan's identity. See Innocence Network Amicus Br. 24-32. McMillan's 1992 murder of A.M. has no role in a *Brady* analysis. The government could not have disclosed McMillan's 1992 murder to petitioners before trial, because their trial occurred in 1985 and 1986. The court of appeals correctly held that "[a] *Brady* violation cannot be predicated on the government's failure to * * * disclose evidence that does not yet exist," and the 1992 murder therefore "has no bearing on the question of the materiality of

any evidence that the government actually did withhold." Pet. App. 36a.

Petitioners contend (Joint Br. 50) that the 1992 murder should be considered in the materiality analysis because *Brady*'s overriding concern is that a conviction is just. But *Brady* is not a general method for challenging the justness of a conviction after trial. The District of Columbia provides an actual-innocence remedy for that purpose. Petitioners invoked that remedy and failed. See Pet. App. 110a ("[P]etitioners have not come close to demonstrating actual innocence."); *id.* at 112a n.14 (petitioners' expert could not characterize Fuller and A.M.'s murders as signature crimes). The court of appeals correctly concluded that *Brady* is the "wrong framework" for evaluating McMillan's 1992 murder. *Id.* at 37a (quoting *District Att'ys Office for the Third Judicial Dist.* v. *Osborne*, 557 U.S. 52, 69 (2009)).

2. Ammie Davis's statement was inadmissible and would have been rejected by the jury

Although joint petitioners have abandoned James Blue as an alternative perpetrator, Overton contends (Br. 43-46) that the defense could have presented Blue in that light if the government had timely disclosed Davis's statement accusing Blue of the murder. Davis's statement is favorable (it is exculpatory), and it was not disclosed to the defense before trial. Pet. App. 116a. No reasonable probability exists, however, that the result of the trial would have been different had the statement been disclosed.

a. As an initial matter, Davis could not have appeared as a witness at petitioners' trial because she was deceased. See A1296-A1301. Overton does not challenge (Br. 44) the court of appeals' conclusion that

Davis's statement would not have been admissible at trial to show that Blue killed Fuller because it does not even arguably fall within any hearsay exception. Pet. App. 37a, 41a; see *id.* at 117a-118a n.18. Instead, Overton contends (Br. 45) that if the government had disclosed Davis's statement in August 1985, when it turned over other *Brady* material, defense counsel could have prevented Davis's death. The trial court correctly found that speculation "dubious," especially considering that Davis was killed for reasons unrelated to this case. See p. 28, *supra*.

Overton further contends (Br. 45) that the defense would have done everything in its power to locate "Shorty," Davis's friend who allegedly witnessed Blue attack Fuller, and that Shorty could have testified at trial. That proposition is equally dubious. Goren testified (and his notes indicate) that he sent police to locate Shorty after he interviewed Davis in August 1985, but such a person could not be located. J.A. 266-268, 271. Nor has Overton located Shorty or proffered any favorable testimony that she would have given, if she exists. Pet. App. 44a-45a. As the court of appeals concluded, Overton "ha[s] not demonstrated *any likelihood* that [he] would have located and obtained helpful testimony from the girlfriend Davis mentioned, or that [he] would have discovered any other admissible evidence implicating Blue in Fuller's murder." *Id.* at 38a (emphasis added).

b. Even if Overton could have prevented Davis's death or located Shorty (and assuming that Shorty would have corroborated Davis's statement), Davis's statement would not have affected the outcome of petitioners' trial. Goren interviewed Davis, and she could not add any further information to the vague,

uncorroborated, and internally inconsistent statement that she gave to Lieutenant Loney. See pp. 27-28, *supra*. Overton contends (Br. 13, 44) that Davis's statement was credible because she accurately stated the date and location of the murder, knew that Fuller was not attacked with a gun or a knife, and knew that Fuller had been robbed of a small amount of money. See J.A. 56 (Davis stating that Blue had "killed her for just a few dollars"). But Davis was not correct that Fuller was robbed of "just a few dollars"—in addition to cash, she was robbed of gold chain necklaces, at least four rings, and a watch. See A5165-A5166, A5168-A5169. And her skeletal information about Fuller's murder would have been common knowledge to anyone following the news of this high-profile case. Furthermore, the jury would have heard that Davis had previously accused Blue of another murder and presented false information to the grand jury, ultimately causing prosecutors to bring and then dismiss charges against Blue. See p. 28, *supra*.

As the trial court explained, Davis's bare-bones account that Blue, acting alone, attacked and murdered Fuller contradicted "numerous eyewitness accounts and other evidence proving that crimes were committed by a large group of young men acting in concert." Pet. App. 117a. Not one other person interviewed in this investigation mentioned Blue as a possible perpetrator, either alone or as part of the group. *Id.* at 118a. Accordingly, "[e]ven if * * * Davis had lived to tell her story, any reasonable jury, in light of all the evidence, would surely have rejected it." *Id.* at 117a-118a.

B. No Reasonable Probability Exists That Disclosure Of Additional Impeachment Evidence Would Have Affected The Outcome Of Petitioners' Trial

Impeachment evidence that is favorable to the defense falls within the government's disclosure obligations under *Brady*. *Giglio*, 405 U.S. at 154. "[E]vidence impeaching an eyewitness may not be material," however, "if the State's other evidence is strong enough to sustain confidence in the verdict." *Smith*, 132 S. Ct. at 630 (citing *Agurs*, 427 U.S. at 112-113 & n.21). The courts below correctly concluded that the undisclosed impeachment evidence "had little prospect of changing the result at trial." Pet. App. 45a.

1. Petitioners contend (Joint Br. 44-45; Overton Br. 46-48) that they could have used the delay in transmission of Ammie Davis's statement to the lead prosecutor to impeach the competency of the government's investigation. The court of appeals correctly concluded that if Davis's statement had been admitted for that limited purpose, "its impact would have been negligible." Pet. App. 43a-44a.

Although transmission of the report to Goren was delayed, the prosecution received it almost three months before petitioners' trial began and had ample time for investigation. See pp. 27-28, *supra*. Goren did not ignore the report; he promptly followed up by interviewing Davis for any further information implicating Blue. That interview, in which Davis was "playful" and "not serious" about her accusation, proved fruitless except for the additional information that Davis's girlfriend who could supposedly corroborate her story was named Shorty. J.A. 266-268, 271. Goren sent detectives to look for Shorty with no success. J.A. 268, 271.

No reasonable jury would have doubted the thoroughness of the government's investigation based on the delayed transmission of this report or any of the other criticisms of a year-long police investigation leveled by petitioners. See, *e.g.*, Joint Br. 48; Overton Br. 48-49 (noting that police allowed Eleby and Porter to be interviewed together for a short period of time before separating them). "In an investigation this complex and extensive," which took nearly a year and involved more than 400 interviews in a high-profile murder, "it is almost inconceivable that mistakes would not be made." Pet. App. 113a. The courts below correctly concluded that evidence of a minor slip-up in this massive investigation did not have any possibility of affecting the outcome of petitioners' trial. *Id.* at 44a, 113a.

2. Information that Eleby was high on PCP when she met with investigators is favorable to the defense and could have been used to impeach Eleby. But the absence of that specific impeachment does not undermine confidence in the outcome of petitioners' trial.

Joint petitioners argue (Br. 47) that "[a] jury would have had doubts about Eleby's entire testimony if it learned that she was high on PCP when she met with investigators." But the jury was well aware of Eleby's PCP use. Jacobs testified that Eleby used PCP at nightclubs. A7644-A7645. The parties stipulated that Eleby was twice admitted to the hospital in 1985 for PCP abuse. A9497. Catlett's counsel derided Eleby and Jacobs in his closing as "the PCP twins." A10741. Charles Turner's counsel told the jury that Eleby may be a PCP junkie. A10926. Furthermore, the jury was already aware from Eleby's own testimony that she had smoked PCP *shortly before she witnessed the*

attack on Fuller in the alley. A535-A536, A561-A562. Goren candidly admitted this in his closing rebuttal. J.A. 193 ("You have to take into consideration the fact that Carrie Eleby and Linda Jacobs said that they were using PCP that day and how that affected their ability to perceive this event.").

Overton points out (Br. 18) that information about Eleby's PCP use was inconsistent with her trial testimony that she had only used PCP once, on the day of Fuller's murder. See A564-A565. But the defense made maximum use of that lie at trial. Overton's counsel argued in closing that Eleby's testimony about her PCP use was "absolutely false," pointing to the stipulations. A10801-A10802; see A10926-10930 (Ruffin's counsel pointing out Eleby's lie about PCP use). He told the jury that Eleby was "obviously heavily into PCP" and reminded them that they had seen her "testify[] in this spacey way," causing a lawyer to question her competency. A10802. The government did not dispute any of that in its rebuttal. Information about Eleby's PCP use was cumulative, and the lower courts correctly concluded that disclosure of additional information on this subject would have been "of little consequence" and "certainly would not have changed the outcome" of the trial. Pet. App. 46a, 127a.

3. a. Information that Kaye Porter lied to police at Eleby's request, by confirming that she was present when Alston told Eleby that he participated in robbing Fuller, is favorable to the defense and could have been used to impeach Porter. This impeachment, however, would not have made any difference in the outcome of petitioners' trial. Porter was a minor witness who testified only about Catlett's partial confes-

sion to her months after the crime. Pet. App. 125a; see A7757-A7758 (Catlett told Porter "[a]ll he did was kick [Fuller] and somebody else stuck the pole up in her," because she "wasn't acting right"). And Porter was impeached, even about Catlett's confession, with grand jury testimony in which she related a much less incriminating version of that confession. A7776, A7780.

Furthermore, the evidence against Catlett was quite strong. Pet. App. 46a. As summarized by the court of appeals, "Alston, Bennett, Eleby, and Thomas all testified that they saw Catlett physically attack Fuller; Montgomery saw him in the park before the murder and watched him cross the street and head toward Fuller; Thomas also recalled hearing Catlett tell someone why he and Fuller's other assailants killed her; and Catlett had no alibi." *Ibid.* The lower courts correctly found "virtually no chance" that disclosure of Porter's previous lie would have affected the verdict. *Id.* at 125a.

b. The information about Porter's lie also could have been used to impeach Eleby. But in light of how extensively Eleby was impeached at trial, the trial court was correct in concluding that the additional impeachment value of Eleby's lie would have had a negligible impact on the jury's assessment of her credibility. Pet. App. 46a. Eleby admitted at trial that she had lied before the grand jury about whether Smith and Christopher Turner were involved in the attack, and she was further impeached with other statements she made to the grand jury that were inconsistent with her trial testimony. See p. 19, *supra*. Eleby testified as an eyewitness to the crime, but the jury also learned that she initially told police that

she was not in the alley, but had only heard about what happened from Alston. A8595-A8599. And the jury was expressly instructed that Eleby's testimony in particular "should be received with caution and scrutinized with care" because she had admitted to having perjured herself before the grand jury. A856-A857.

Overton contends (Br. 51-52) that Eleby's request for Porter to lie would have provided grounds for a "fundamentally different kind" of impeachment because it showed that she "actively sought to fabricate evidence." (emphasis omitted). The impeachment of Eleby at trial, however, involved a significantly more serious false statement than the one Eleby asked Porter to make. Porter's false statement was an unsworn statement during a police interview. But Eleby admitted at trial that she had previously lied under oath. Furthermore, multiple witnesses—including Alston—corroborated that Alston had indeed made an incriminating statement to Eleby in a car. J.A. 301, 303, 307-308. Eleby was thus not "fabricat[ing] evidence" (Overton Br. 52) (emphasis omitted), but creating false corroboration for something that was true. Pet. App. 124a-125a.

As Overton notes (Br. 52-53), a witness who has already been thoroughly impeached by one means may still be further discredited by others. But cases where such additional impeachment is material are unusual and do not compare to this one. In *Wearry* v. *Cain*, 136 S. Ct. 1002 (2016) (per curiam), the government's case was built on the jury crediting one witness's account, and the government withheld evidence that (1) one of the witness's claims was physically impossible; (2) the witness had coached another witness to lie

about the murder; and (3) the witness may have implicated the defendant to settle a personal score. *Id.* at 1006-1007. That evidence, combined with other undisclosed information of significance, required reversal. Likewise, in *Kyles*, the government failed to disclose that one of its two best witnesses had earlier provided a "vastly different" account of the murder that "would have fueled a withering cross-examination, destroying confidence in [that witness's] story and raising a substantial implication that the prosecutor had coached him." 514 U.S. at 442-443. Here, by contrast, Eleby's effort to get Porter to confirm her (true) account of the car ride with Alston, which had two other witnesses (plus Alston) to corroborate it, had no similar potential to undermine the prosecution. J.A. 303, 307-308.

4. Joint petitioners (but not Overton) contend (Br. 21) that the prosecution should have disclosed that police "question[ed] [Linda Jacobs] hard" after she denied knowing anything about the crime while insisting that Smith and Christopher Turner "didn't have anything to do with the murder." A1009. Hearing testimony revealed that, in response to Jacobs's contradictory claims, Detective Sanchez-Serrano repeatedly asked her, in a raised voice, "[h]ow do you know that?" and slapped his hand on a desk. A2298-A2299, A2479-A2480.

That a detective "changed [his] tone with [Jacobs]" during an interview is not favorable evidence under *Brady*. A2479; *Agurs*, 427 U.S. at 109 (prosecution need not give the defense a detailed accounting of all police investigatory work on a case). Furthermore, although petitioners contend (Joint Br. 46-47) that "Jacobs immediately recanted having seen the crime," Goren's notes state only that, after admitting she had

been in the alley and seen something, Jacobs tried "to back out of telling us," not that she recanted. A1009. Jacobs did more clearly "vacil[l]ate[ ] back and forth" in subsequent interviews before her grand jury testimony. *Ibid.* But, as Jacobs informed the grand jury, she did this because she had recently been accused of "snitching" and threatened with a knife. A1973-A1978 (Jacobs was "scared because they found out so quickly that [she was] down here at court."). The trial court agreed to withhold that portion of Jacobs's grand jury testimony at trial, A7519-A7522, and given the underlying circumstances, petitioners would not likely have exposed this event to the jury if it had been disclosed. In any event, as the court of appeals noted, Jacobs was impeached with her denial of witnessing the attack before acknowledging that she was there, so the jury was aware that she had vacillated. A7673-A7674, A7707-A7708; Pet. App. 22a n.18.

5. Aunt Barbara's statement to police that she did not recall Maurice Thomas telling her about an attack in the alley could have been used to impeach Thomas's trial testimony that, after witnessing the attack, he ran home and told his Aunt Barbara what he saw. See A1010. Aunt Barbara's statement to police, however, would have been totally unsurprising to the jury, given Thomas's trial testimony that she told him, "don't say nothing to no one else." J.A. 121; see Pet. App. 47a.

Joint petitioners (but not Overton) attempt (Br. 13, 48-49) to identify inconsistencies between Thomas's grand jury testimony and his trial testimony to show that his testimony was weak to begin with.[9] But peti-

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[9] Joint petitioners contend (Br. 13, 48) that Thomas told the grand jury he had witnessed the attack from an impossible vantage

tioners had all of that information before trial and used it to extensively cross-examine Thomas about what he saw. Nonetheless, the defense never found any effective way to discredit this junior high school student with "no motive to lie, no skin to save." A10762-A10764; Pet. App. 47a (noting strength of Thomas's trial testimony). As the court of appeals concluded, Aunt Barbara's statement that she did not recall Thomas having told her about the attack on Fuller "was unlikely to have discredited Thomas in any significant way." Pet. App. 47a.

Moreover, as described above, p. 35, *supra*, petitioners were aware that Thomas claimed to have told his Aunt Barbara about the assault in the alley, and the defense noticed that the government had not called her as a witness to corroborate Thomas's account. See A10574-A10576 (Catlett's counsel asks for a missing-witness instruction for Aunt Barbara, but

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point. He did not. The alley where Fuller died runs to the west side of Ninth Street and, across the street, a second alley runs from Ninth to Tenth. Because the second alley starts further south, a person standing in that alley could not see far into the alley where Fuller died. J.A. 50. But Thomas never testified that he stood in the second alley. Instead, he told the grand jury that he was "like by" and "near" that alley, A1929, A1944, and that he was "standing by that fence where the Doberman Pinscher is," A1943. Thomas's trial testimony was entirely consistent: Thomas said he stood on the east side of Ninth Street in front of a house with a fence and a dog, "just a little bit more up" from the second alley. A7271-A7274; see A613-A614, A7373-A7380; J.A. 128-130. That location, which was both "by" and "near" the second alley, had a clear view to the alley across the street. See J.A. 50. Nor did Thomas alter his testimony about the group of observers. Thomas told the grand jury that this group was "behind" the people assaulting Fuller, A1955-A1956, and his trial testimony was the same, A620-A621, A640-A641, A7281-A7282, A7386.

the trial court finds that defense counsel "had plenty of time" to interview her and could have called her to dispute Thomas's account); 545 A.2d at 1210 n.13 (court of appeals rejecting Catlett's missing-witness argument on direct appeal). The defense's decision not to pursue Aunt Barbara's testimony shows that petitioners did not view the missing corroboration to be an important part of their defense.

6. Joint petitioners contend (Br. 47) that, to the extent the government relies on heavily impeached witnesses, such as Eleby, Jacobs, and Porter, "additional impeachment of them is hardly inconsequential." But extensive impeachment is the very reason why cumulative lines of impeachment often have little additional force. Jacobs, for example, was impeached with her earlier denials of having witnessed the crime, and further evidence that she had "vacillated" would have been immaterial. See pp. 72-73, *supra*. Nevertheless, Jacobs's testimony was both admissible and believable. In particular, Jacobs's emotional breakdown when asked to describe Rouse's assault on Fuller supported her claim that she saw a group attack in the alley. Pet. App. 107a. Her testimony was therefore probative even though Jacobs was "young," "inarticulate," "not very smart," and initially hesitant to reveal what she had seen. J.A. 193; A658-A663; see A12611 (Judge Weisberg describes Jacobs's trial testimony as "pretty convincing").

C. The Undisclosed Evidence Considered Cumulatively Does Not Raise A Reasonable Probability That Petitioners Would Have Been Acquitted

1. The court of appeals correctly concluded that no reasonable probability exists that the undisclosed evidence, considered cumulatively, would have changed

the outcome of petitioners' trial. Pet. App. 48a-54a. Even with the additional impeachment information identified by petitioners, the government's case looks almost no different than it did at trial. The jury would have learned of a delay in transmitting Ammie Davis's statement to Goren—an isolated misstep that would have cast no doubt on the comprehensiveness of the investigation, especially because Goren immediately investigated Davis's story. The jury would have heard some additional impeachment of Eleby and Jacobs, who were thoroughly impeached at trial yet still provided remarkably consistent accounts of witnessing a group attack. It would have heard incremental impeachment of Porter, a minor witness against Catlett. And it would have heard that Aunt Barbara did not recall Thomas's telling her that he witnessed an attack in the alley (which she had told him not to report to anyone). The court of appeals correctly concluded that this information would have had a negligible impact on the jury's consideration of the case. *Id.* at 48a.

Although petitioners have tried to construct a persuasive alternative-perpetrator theory that they could have presented to the jury in an attempt to raise a reasonable doubt about their guilt, the undisclosed evidence is not material unless it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 434-435. But against petitioners' skein of speculation, "the government presented the testimony of several eyewitnesses," including two cooperators who confessed their own guilt and implicated petitioners in a group attack on Fuller. Pet. App. 49a. Moreover, no witness (aside from the incredible Ammie Davis) has ever disputed the overall description of the

prosecution's witnesses about how the attack occurred. Montgomery credibly testified to having seen the events leading up to the attack unfold in the park; Thomas described seeing the beginning of the attack in the alley as he walked by; and Eleby and Jacobs witnessed the attack culminate in the sodomy in the garage. This testimony corroborated Alston and Bennett's description of a group attack planned in the park and carried out in the alley. See pp. 10-15, *supra*. And each petitioner failed to present a convincing alibi.

The eyewitness testimony was further corroborated by incriminating admissions from some of the petitioners, including Yarborough's videotaped statement describing a group attack (p. 7, *supra*); Catlett's statement on the night of the attack (overheard by Thomas) that the group had to kill Fuller because she recognized someone (J.A. 126-128); Catlett's statement to Porter that "[a]ll he did was kick her and somebody else stuck the pole up in her" (A7757-A7758); Rouse showing up at Ward's house that night with blood on his pants (A755-A758) and his later statement to her that he "did the worst thing to that lady in the alley" (A760); and the incriminating conversation between Overton and Christopher Turner overheard by Detective Villars (A690-A692).

Against all of that evidence, petitioners theorize that Fuller's faint groans, heard by only two members of a group that walked through the alley between 5:30 and 5:45 p.m., would have given rise to a credible alternative theory that Fuller was being attacked at that time by one or two perpetrators other than Alston, Bennett, or any of the petitioners. As the court of appeals found, that would have been "exceedingly

implausible and difficult for the jury to accept." Pet. App. 51a-52a.

Petitioners rely (Joint Br. 42) (citation omitted) on a reporter's notes from a 1997 interview with Goren to claim this case was a "close one" that "easily could have gone the other way." This was not a close case. Ten different judges in the District of Columbia have examined petitioners' convictions, and every one of them has been thoroughly convinced of petitioners' guilt. See, *e.g.*, A9041 (trial judge); 545 A.2d at 1206 n.2 (direct appeal); Mem. Op. & Judgment 2 (Charles Turner's direct appeal); Pet. App. 123a, 129a (post-conviction hearing); Pet. App. 51a (post-conviction appeal). The reporters notes are, in fact, consistent with the lower courts' assessment. Goren noted that while the case seemed "[n]ot a good one" at times during the investigation, "[i]t ended up being a much stronger case" at trial. A1734, A1758. And he testified at the hearing that the government "ended up with a strong case," that "everything sort of fell [the prosecution's] way" during the trial, and that "[i]t ended up being a much stronger case than it was when it began." A1735, A1751. Nor does the length of deliberations show any deficit of proof given the jury's need to individually assess the culpability of ten defendants after a six-week trial and three days of closing arguments.

Petitioners must present more than the "mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial." *Agurs*, 427 U.S. at 109-110. They must demonstrate a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been differ-

ent." *Bagley*, 473 U.S. at 682. They have not come close to making that showing.

2. Petitioners contend (Joint Br. 32-33, 37; Overton Br. 40-43) that the court of appeals speculated about what the jury *could have* done with the non-disclosed evidence, rather than focusing on what the jury *would have* done with it. That is not an accurate description of the court's analysis.

Because *Brady* asks whether "a reasonable probability" exists that withheld evidence would have affected the verdict, *Strickler*, 527 U.S. at 281, some hypothesizing is inevitable. But even though the court of appeals considered what the jury might have thought about the previously undisclosed evidence, the court unquestionably concluded the jury *would have* rejected it. The court explained that petitioners' theory had to be weighed against the testimony of several eyewitnesses, including two cooperators, which was corroborated by several incriminating statements made by petitioners. Pet. App. 49a. The court concluded it was "far more likely * * * that the jury would have" rejected petitioners' alternative-perpetrator theory "than that the jury would have thought * * * all the government's witnesses were lying." *Id.* at 50a. The court explained that the alternative-perpetrator theory "would have been exceedingly implausible and difficult for the jury to accept" because it would have to conclude "not only that all the government witnesses were lying or mistaken about every defendant at trial, but that Alston and Bennett, the government's two cooperating witnesses, were innocent even though they had each pleaded guilty to homicide." *Id.* at 51a-52a. That

"would not have been a plausible claim to make to the jury." *Id.* at 52a.

In that respect, this case is nothing like *Smith*, in which the Court refused to entertain reasons why a jury "might" have discounted undisclosed favorable statements of a witness who provided "the *only* evidence linking [the defendant] to the crime." 132 S. Ct. at 630. Here, overwhelming evidence established petitioners' guilt, and the court of appeals confidently concluded that the jury would have disbelieved petitioners' alternative-perpetrator theory in light of that evidence.

Nor is petitioners' case anything like *Wearry*, where the Court described the State's capital-murder case against the defendant as a "house of cards" built on the jury crediting the account of an eyewitness over the defendant's alibi. 136 S. Ct. at 1006. The Court had no confidence that various items of undisclosed impeachment evidence would have been rejected by the jury and criticized the state post-conviction court for "emphasiz[ing] reasons a juror might disregard new evidence while ignoring reasons she might not." *Id.* at 1007. The court of appeals here, however, reviewed the multiple corroborating sources supporting the verdict and found it implausible that a jury would conclude that Fuller was attacked by an alternative perpetrator in light of the strong evidence that petitioners had launched a group attack.

3. Petitioners and their amici contend (Joint Br. 26; Overton Br. 22; Cato Institute Amicus Br. 4-10; Former Prosecutors Amicus Br. 19-21) that the court of appeals applied a heightened *Brady* standard that required petitioners to show that the jury would have

doubted "virtually everything" offered by the government's witnesses. That argument lacks merit.

The court of appeals did not hold that, under *Brady*, material exculpatory evidence must contradict all of the government's evidence at trial. Rather, the court recognized that undisclosed information can undermine portions of the government's case. Pet. App. 49a, 54a (providing examples). The court concluded that the alternative-perpetrator information lacked that potential because it would have assisted the defense only in challenging "the basic structure of how the crime occurred," *i.e.*, the theory of a group attack. *Id.* at 54a. Because all eyewitnesses had described such an attack, the undisclosed information could have given rise to a reasonable probability of a different outcome only if it "would have led the jury to doubt *virtually everything* that the government's eyewitnesses said about the crime." *Ibid.* That analysis did not deviate from this Court's well-established materiality standard. It represented the only logical way in which the undisclosed evidence could have undermined confidence in the outcome of petitioners' trial. See also *id.* at 123a (trial court concluding that petitioners' alternative-perpetrator theory was "definitely not material" because the possibility that McMillan killed Fuller to the exclusion of petitioners "flies in the face of all the evidence").

Petitioners essentially acknowledge (Joint Br. 43-44) that their alternative-perpetrator evidence would only be material if it caused the jury to doubt all of the government's eyewitnesses. Petitioners' theory of how the undisclosed evidence would create reasonable doubt is that the jury would hear the alternative-perpetrator theory and it would cause them to "seri-

ously consider that [the prosecution's] witnesses" were perjuring themselves by "attempting to describe something that they had not seen." *Ibid.* Indeed, throughout their briefs, petitioners include references (*id.* at 17, 23-24, 43-44; Overton Br. 19; see Center on Wrongful Convictions of Youth Amicus Br. 14-25) to the recantations of supposedly perjured testimony from Alston, Bennett, and others. Those recantations have no role whatsoever in the materiality analysis. The recantations of Alston and Bennett were rejected by the trial court as "nothing short of preposterous," Pet. App. 103a; Jacobs's hearing testimony was dismissed as useless, *id.* at 104a; Montgomery did not actually recant but instead reaffirmed the truth of his testimony, *id.* at 109a; and the court rejected Yarborough's testimony trying to disavow his videotaped statement as "patently incredible," *id.* at 98a. And post-verdict recantations in any event cannot affect the analysis of whether undisclosed evidence was material—*Brady* must focus on prosecutorial decisions at the time of trial and cannot be based on future events that the jury could not have heard about.

4. Finally, petitioners' amici contend (Innocence Network Amicus Br. 17-21; see Joint Br. 39; Overton Br. 32) that third-party perpetrator information is presumptively material under *Brady* absent strong physical evidence of guilt. None of the cases cited by amici support that general proposition. Each applies a usual *Brady* analysis evaluating all the evidence to determine whether a reasonable probability exists that the undisclosed information would have affected the outcome of trial. The absence of substantial physical evidence linking a defendant to the crime, an otherwise weak case, and compelling evidence that

another person committed the crime are all factors that obviously support a finding of materiality. But, as demonstrated above, the case against petitioners is not weak, and the alternative-perpetrator evidence is entirely speculative. And although no physical evidence linked petitioners to the crime (other than Ward's testimony that she saw blood on Rouse's pant leg on the night of the murder), none of the cited cases involves testimony from accomplices who accepted criminal responsibility.

D. Nothing Justifies A Different Conclusion For Overton

Overton contends (Br. 23, 49-53) that Eleby's testimony was the linchpin of the "flimsy" case against him, and that further impeachment of her would have triggered his acquittal. As proof that "Eleby's testimony alone explains why [he] was convicted," Overton notes that the jury acquitted Harris, against whom Eleby did not testify. *Id.* at 50; see *id.* at 8, 23, 32-33, 39. That argument is misguided.

Although the jury deliberated for two additional days before convicting Overton, the evidence against him was "overwhelming." 545 A.2d at 1217. As Overton notes (Br. 7, 23), Alston, Bennett, and Eleby testified that Overton was a major participant in Fuller's murder. Critically, Montgomery substantially corroborated that testimony. Montgomery testified that Overton spent the entire afternoon in the park and returned to the park with Catlett after news of the crime began to spread, thereby refuting Overton's alibi. A360, A5529, A5542-A5543, A5549, A5677-A5678. Even more significantly, Montgomery testified that, after "[s]omebody said they were going to get that one," Montgomery saw Overton pointing in the direction of a lady standing on the corner of

H Street. A302-A304. Overton then left the park along with Catlett, Rouse, Charles Turner, and several others. A305-A306, A324-A325.

That testimony did not, as Overton suggests (Br. 23), "plausibly suggest[] that Overton was not a participant in the attack." To the contrary, it strongly corroborated Alston and Bennett's testimony that, after agreeing to commit a robbery, Overton joined the others in pursuit of Fuller. A366-A380, A466-A475. Nor did Overton head "in a different direction" or "away from the location where Mrs. Fuller's body was later found." Overton Br. 10; *id.* at 33. Montgomery testified that Overton (and others) appeared headed toward Ninth Street, a direct route to the alley where Fuller died. A305-A306. And although Overton lived on Ninth Street, no one (including Overton) testified that he separated himself from the group or went home. A447.

Montgomery's testimony about Overton was therefore devastating. Nor has Overton, who was godfather to Montgomery's child, A5585, ever explained why Montgomery would falsely implicate him. Indeed, although Overton now characterizes Montgomery's testimony as "consistent" with his innocence (Overton Br. 9), at trial he argued that Montgomery must have been remembering a different day. A10829-A10831. And on appeal, Overton conceded that Montgomery's testimony "did lend strength" to the case against him. Overton Direct Appeal Br. 29.

Overton's statements to Christopher Turner while in custody further bolstered the case against him. Detective Villars testified that Overton said he "knew of the two persons that gave them up" and agreed with Turner that the police knew where everyone was

in the alley. A690-A691. Although not a direct confession, those statements were substantially incriminating, as Turner effectively acknowledged when, after noticing Detective Villars, he assured Overton not to worry as Villars "just came in." A692.[10]

Although Thomas knew Overton and did not see him in the alley, A610, A7389-A7390, his testimony was "somewhat neutral" as to Overton. 545 A.2d at 1217. Thomas watched the attack only briefly and was focused on the group surrounding Fuller. A640. Although he saw other people standing further back, he did not see any of their faces. A620, A7386-A7388, A7427-A7428; see A7401 (Thomas knew Jacobs but did not see her in the alley). At best, therefore, Thomas's testimony suggested only that Overton was not assaulting Fuller during the moment when Thomas looked in. It did not disprove the testimony from others that Overton was in the alley and participated in the attack, A430, A5872; dragged Fuller into the garage, A5885-A5886; and held her legs while she was sodomized, A497, A553-A554.

As for Overton's alibi, it thoroughly undermined his case, and "could very well have been the key to [Overton's] conviction." Overton Direct Appeal Br. 30. Overton had two previous robbery convictions and did not testify. See A11500.[11] His grandmother, the key

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[10] In 1993, a court found that Detective Villars had provided false testimony in another case. A1722, A2287-A2288. Although troubling, that incident occurred after petitioners' trial and does not constitute *Brady* evidence in this case.

[11] By sentencing, Overton had three robbery convictions and an outstanding armed robbery warrant. A11500. His sentence in this case was made consecutive to his most recent robbery sentence of five to 15 years of imprisonment. A11501.

witness to the story that Overton came home drunk at 3 p.m. and was asleep when Fuller was killed, essentially admitted that her testimony was coached and not her own recollection. See p. 20, *supra*. On appeal, Overton described his own alibi as "deadly," "bad," "seemingly false," and "devastated." Overton Direct Appeal Br. 1, 27, 29; see 545 A.2d at 1217 (Overton's alibi "discredited").

In short, the jury did not convict Overton because Eleby's extensive cross-examination was insufficient. Indeed, Overton admitted on appeal that Eleby was "no real factor" in his conviction because of, *inter alia*, her "total impeachment which was as varied and far-reaching as you will ever find in a criminal trial." Overton Direct Appeal Br. 29. Nor was Eleby's failure to see Harris in the alley the key to Harris's acquittal. In fact, the government had a substantially weaker case against Harris, wholly apart from Eleby's testimony. Harris took the stand in his own defense, A8487-A8577, and he presented five alibi witnesses, none of whom was thoroughly discredited. A8305-A8480; see 545 A.2d at 1217. Furthermore, Montgomery, who knew Harris, testified that he did not see Harris in the park on the day of the murder. A5605-A5609. Although Alston and Bennett testified that Harris participated in the crime, in his initial statement to police, Bennett claimed that he did not know Harris or Harris's name, and said that if Harris was in the alley, he did not do anything. A5965-A5967. Accordingly, Harris's acquittal was "perfectly logical" and "[not] surpris[ing]," while a similar result for Overton would have thrown "logic" "out the window." A1738 (Goren's post-trial comments).

* * * * *

The focus of a materiality analysis under *Brady* is whether, in the absence of the undisclosed information, the defendant "received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles*, 514 U.S. at 434-435. The evidence of petitioners' guilt is overwhelming, and no reasonable probability exists that the undisclosed information at issue would have changed the outcome of petitioner's trial. The Court should have confidence in petitioners' convictions.

CONCLUSION

The judgment of the D.C. Court of Appeals should be affirmed.

Respectfully submitted.

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APPENDIX

Glossary

Petitioners

Timothy Catlett ("Snotrag" or "Tim-Tim"). Catlett was seen dancing and singing "I need some money" in the park; Thomas later saw Catlett striking Fuller and overheard him saying they had to kill her.

Russell Overton ("Bo-Bo" or "Bo"). Montgomery saw Overton pointing in Fuller's direction and then crossing H Street with numerous co-defendants; Detective Villars overheard Overton and Christopher Turner discussing Fuller's murder.

Levy Rouse. Numerous witnesses saw Rouse sodomize Fuller with a pipe, and he later made damaging admissions to his girlfriend Catrina Ward.

Kelvin Smith ("Hollywood"). Smith was dating Carrie Eleby, and Eleby and Jacobs were searching for him when they entered the alley and saw Fuller's murder.

Charles Turner ("Fella"). Alston testified that Turner shoved Fuller into the alley and held one of her legs while she was sodomized.

Christopher Turner ("Chrissie"). Charles Turner's younger brother; Detective Villars heard Christopher Turner and Overton discussing Fuller's murder.

Clifton Yarborough. Yarborough gave both written and videotaped statements and, in the latter, admitted that he was present in the alley while others assaulted and sodomized Fuller.

Other Defendants

Calvin Alston. Alston gave a videotaped statement claiming that he acted as a lookout; by trial, Alston had pleaded guilty to second-degree murder and admitted that he targeted Fuller for robbery.

Harry Bennett ("Derrick"). Bennett gave a videotaped statement, entered a guilty plea to manslaughter and robbery, and testified for the government at trial.

James Michael Campbell ("Mike"). Campbell, who gave a videotaped statement, was severed before trial and later pleaded guilty to manslaughter and attempted robbery.

Alphonso Harris ("Monk"). Alston and Bennett testified against Harris at trial but he presented an alibi defense and was acquitted.

Felicia Ruffin ("Lisa" or "Luncheon Lisa"). Bennett testified that Ruffin (who was acquitted) was bending down and picking things up in the alley and that she took one of Fuller's rings from Rouse.

Steven Webb. Webb was convicted at trial and later died in prison.

Police and Prosecutors

AUSA Jeffrey Behm. Behm was the second chair prosecutor at trial and had personal knowledge from an earlier prosecution that Ammie Davis had falsely accused James Blue of a different murder.

AUSA Jerry Goren. Goren became the lead prosecutor in late November 1984 after Alston's videotaped statement; he testified at the post-conviction hearing about, *inter alia*, interrogation techniques and evidence not turned over to the defense.

Detective Donald Gossage. Gossage knew everyone in the Eighth and H Street area and learned from Eleby that Alston had made admissions to her about the crime.

Detective Patrick McGinnis. See below.

Detective Ruben Sanchez-Serrano. Sanchez-Serrano was partners with McGinnis and the two interviewed many of the defendants and witnesses, including Eleby.

Officer Melvin Scott. Scott was detailed to the Fuller investigation and participated in some of the interviews, including Webb.

Key Prosecution Witnesses

Calvin Alston. See above.

Harry Bennett ("Derrick"). See above.

Dr. Michael Bray. Bray, a forensic pathologist, testified that Fuller died from a combination of injuries and estimated the time of death between 4:30 and 6:30 p.m.

Carrie Eleby. Eleby, a teenage PCP user, was looking for her boyfriend Smith when she viewed Fuller's murder in the alley and recalled seeing her pink hair curlers on the ground.

William Freeman. Freeman discovered Fuller's body when he went to the garage to urinate and then saw two men run into the alley from Ninth Street and run towards I Street when the police arrived.

Vincent Gardner ("Boo"). Gardner went to the Eighth Street entrance to the alley after he heard about a murder and saw Charles Turner, Rouse, Catlett, and Smith there.

Linda Jacobs ("Smurfette"). Jacobs, a friend of Eleby, smoked PCP with her and then watched a large group attack and murder Fuller in the alley.

Detective Patrick McGinnis. McGinnis reported to the crime scene and later interviewed numerous defendants and witnesses, including Yarborough.

Melvin Montgomery. Montgomery observed a group of people (including Charles Turner, Overton, Catlett, and Rouse) planning Fuller's robbery in the Eighth and H Street park, and then saw the assailants depart in two groups towards the alley.

Kaye Porter. Porter informed AUSA Goren that Eleby had asked her to claim that she (Porter) had overheard Alston admit to robbing Fuller; at trial, Porter testified that Catlett told her that he just kicked the victim and that someone else stuck the pole up her.

Maurice Thomas. From the Ninth Street sidewalk, Thomas saw Fuller being assaulted by a large group and later overheard Catlett explain to another man that they had to kill her because she recognized someone.

Detective Daniel Villars. Villars overheard Christopher Turner and Overton make incriminating remarks while in custody.

Catrina Ward. Ward, who was in a love triangle with Bennett and Rouse, testified that Rouse had blood on his pants on the night of the murder and that he later told her that he "did the worst thing to that lady in the alley."

Other Trial Witnesses

Christopher Taylor. Taylor, who testified in support of Rouse's alibi, was impeached with his statements to police officers that he heard people talk about "getting paid"; saw Rouse and others cross H Street towards a woman who met Fuller's description, and then watched the murder in the alley.

Others

Roland Franklin ("Burt"). Franklin gave a videotaped statement describing events before and after the crime that implicated several petitioners.

Dorothy Jean Harris ("Aunt Barbara"). Thomas testified that Aunt Barbara, a family friend, warned him not to tell anyone else about having seen an assault in the alley.

James Blue. Accused by Ammie Davis of murdering Fuller; Blue later murdered Davis for unrelated reasons.

Ammie Davis. Davis told Lieutenant Loney that she had seen James Blue pull a woman into the alley on the day of the murder and beat her, and that her friend "Shorty" was also there.

Willie Luchie. Luchie told investigators that he walked through the alley with others that evening, heard "several groans" as they passed the garage, and remembered the doors to the garage being closed.

James McMillan. McMillan, who lived on Eighth Street, was identified by Freeman and others as one of the two men who entered the alley while Freeman was waiting for police; McMillan subsequently robbed and assaulted two women and, upon his release from prison, sodomized and murdered another woman in a nearby alley in 1992.

Gerald Merkerson. Merkerson was identified as the second person who entered the alley from Ninth Street after the murder and ran away when the police arrived.

Ronald Murphy. Murphy walked through the alley with Luchie, Watts, and others at around 5:30-5:45 p.m. and heard nothing unusual; Murphy told police he purchased Fuller's ring later that evening at the liquor store for $5 from an unknown man and woman.

Charnita Speed. Speed saw McMillan and Merkerson in the alley and said that McMillan appeared to be putting something under his coat and Merkerson appeared to be stuffing papers under his shirt.

Jackie Tylie. Tylie went into the alley with Freeman after he discovered Fuller's body and told police that she saw McMillan there, accompanied by two other people.

Jacqueline Watts. Watts walked through the alley with Luchie, Murphy, and others and reported hearing some moans; Watts later received one of Fuller's rings from her boyfriend Murphy.

AND
BRIEFS

Supreme Court, U.S.
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v.

UNITED STATES OF AMERICA

RUSSELL L. OVERTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

REPLY BRIEF FOR PETITIONERS CHARLES S. TURNER, CLIFTON E. YARBOROUGH, CHRISTOPHER D. TURNER, KELVIN D. SMITH, LEVY ROUSE, AND TIMOTHY CATLETT

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The government concedes that the prosecution suppressed numerous forms of favorable information from petitioners in their trial. It seeks to excuse that suppression through one principal contention—namely, that all of the information could not be material under *Brady* v. *Maryland*, 373 U.S. 83 (1963), because the prosecution presented numerous (albeit impeached) witnesses who testified to seeing or hearing about a group assault of Mrs. Fuller.

The proposition that the prosecution's case against petitioners was "overwhelming" (Br. 80, 87) cannot be squared with the jury's verdict or its deliberations; the lead prosecutor's statements to the jury or his post-trial statements; the prosecution witnesses' contradictions or the grounds on which they were impeached; or the objective crime-scene evidence. Indeed, relying on that crime-scene evidence, petitioners have already demonstrated (and the government does not dispute) that the prosecution's theory and witnesses were affirmatively wrong about one of the central facts of the case—where the sodomy of Mrs. Fuller occurred. Pet. Br. 38-39.

Once one dispenses with the notion that the prosecution's case was overwhelming, this is not a close case. The government suppressed a battery of favorable evidence that would have given rise to an alternative theory of the crime and a strong circumstantial case that someone else was guilty and that petitioners were innocent. Using the suppressed evidence, petitioners would have challenged the prosecution case on how, where, and even when the crime occurred.

That evidence, in conjunction with other suppressed evidence that would have undermined the government's investigation and further impeached several witnesses, gives rise to far more than a "reasonable probability" that the jury would have had a reasonable doubt. *E.g.*, *Cone* v. *Bell*, 556 U.S. 449, 470 (2009). Applying that standard, as it did recently in *Smith* v. *Cain*, 565 U.S. 73 (2012), and *Wearry* v. *Cain*, 136 S. Ct. 1002 (2016) (per curiam), the Court should hold that the evidence suppressed by the prosecution was material, and reverse the judgment of the District of Columbia Court of Appeals.

A. The Prosecution Suppressed Evidence Indicating That Someone Else Committed The Murder

Presumably because petitioners have not yet identified a witness who will testify that he saw James McMillan commit the murder, the government derides petitioners' alternative theory as a "skein of speculation." Br. 53-55, 76. But a lack of direct evidence of McMillan's having committed the crime is no obstacle to arguing his responsibility. See Pet. App. 34a.

The circumstantial evidence implicating McMillan would have been powerful. See *Desert Palace, Inc.* v. *Costa*, 539 U.S. 90, 100 (2003); A850 (instructing jury that "the law doesn't make any distinction between circumstantial and direct evidence"). McMillan was assaulting and robbing other middle-aged women in the same neighborhood at the time of Mrs. Fuller's death. Those assaults were exceptionally violent; indeed, in one, the victim thought he was trying to murder her rather than rob her. Pets. Br. 34.[1] McMillan's criminal activity renders his behavior around the garage particularly inculpating. Mrs. Fuller was a middle-aged woman who was beaten and left in a garage. A jury would naturally infer that a person with a pattern of beating up middle-aged women was responsible for her death if it learned that the person ran towards the garage where her body was found, stood in front of it for several minutes without speaking to others, concealed something under his jacket, and then ran at the sight of police. J.A. 24, 26-28.

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[1] The government refers to the criminal records of some petitioners. Br. 56 n.7. But the government does not argue that any of those crimes resemble their theory of petitioners' involvement in the murder of Mrs. Fuller, or that the criminal histories would have been admissible at trial.

The government notes that petitioners did not use William Freeman's testimony regarding the presence of two men by the garage to mount an alternative-perpetrator defense. Br. 55-56. But that only serves to underscore the importance of the suppression of Freeman's identification of McMillan. Michele Roberts, the defense attorney most focused on Freeman's testimony, testified that she would have presented an alternative-perpetrator defense if McMillan's identity had been disclosed. A2254-A2261, 5/1/12 Tr. at 1177-1178 (A12549-A12550).

Moreover, the prosecution suppressed evidence that would have made McMillan an even more attractive suspect to the jury. McMillan's girlfriend observed him by the garage, and thought he was "acting suspiciously." J.A. 26-28. Worse yet, McMillan did not act as most people would upon seeing someone with whom they were romantically involved. He did not talk to his girlfriend—or ask her what she was doing by the garage, or ask her why a group was waiting around the garage. A natural inference from that behavior is that McMillan did not ask because he already knew what had happened in the garage.

The suspicious circumstances surrounding McMillan's presence in the alley would not have been lost on the jury. It would have caused the jury to suspect that McMillan was responsible for Mrs. Fuller's death.

B. The Prosecution Suppressed Witness Statements Indicating Mrs. Fuller Was Killed By One Or Two People

The circumstantial case against McMillan would have been strengthened by evidence that at around 5:30 p.m., Willie Luchie and Jackie Watts heard "several groans" coming from the garage. J.A. 25, 27, 53-54. Neither they nor anyone with them saw a group by the garage. And Luchie saw that both doors to the garage were closed. Notably, when Freeman discovered Mrs. Fuller's body

shortly after 6 p.m., one of the doors was open. Pet. App. 4a. This evidence itself suggests that Mrs. Fuller was being assaulted by someone inside the garage approximately 30 minutes before McMillan's suspicious behavior by the garage. The government's efforts to explain away that evidence are unavailing.

1. The government suggests that what witnesses saw and heard in the alley at 5:30 p.m. is irrelevant because the attack on Mrs. Fuller occurred "not long after" she left her house around 4:30 p.m. Br. 54-55. But that contention does not explain why both garage doors were shut when Luchie looked at them. That fact alone suggests someone was in the garage, most likely assaulting Mrs. Fuller, when the groans were heard.

The government complains that the lead prosecutor's statement regarding Luchie "lacks detail and was not tested in any hearing." Br. 58. Leaving aside the irony in the government complaining that suppressed evidence was not tested, the statement that Luchie "remembers the doors to the garage being closed" (J.A. 25) is hardly "vague," and the government never explains what additional "detail" would be useful. Br. 58. The meaning of what Luchie told investigators prior to petitioners' trial is both plain and plainly significant.

The government next asserts that one would expect to hear more noise if Mrs. Fuller was being assaulted. Br. 58. But that argument fails to account for the nature of Mrs. Fuller's injuries. Mrs. Fuller sustained significant injuries to her head, including hemorrhaging in her brain and around her skull. A1190, A1197-A1198. Those injuries likely would result in her being dazed or semi-conscious, and thus only capable of groaning during the assault.

2. Rather, what is implausible is the government's contention that Mrs. Fuller was attacked "not long after"

leaving her house "after 4:30 p.m." Br. 54. As the government admits, that would mean Mrs. Fuller did not lose consciousness between the attack and Luchie's and Watts's observations at approximately 5:30 p.m. Br. 58. But Mrs. Fuller had suffered a brain hemorrhage and lost so much blood that it had collected in a pool around her. A1193, A1197-A1198. It is highly unlikely, to say the least, that a 4' 11", 99-pound, middle-aged woman could sustain those injuries and remain conscious for any substantial period of time. A1194.

Indeed, the government's timeline fails to account for other objective evidence. Mrs. Fuller's blood-alcohol content was measured at 0.20 after her death and, although it could not be definitively linked to her, a vodka bottle was found with her belongings in the alley. A2226-A2228. Notably, her son told detectives that she had not been drinking "that day." A1362. Because she evidently purchased and drank alcohol before the attack, it is unlikely that she was attacked soon after leaving her house. Br. 54.

Accordingly, the suppressed statements by Luchie and Watts indicate not only that Mrs. Fuller was killed by one or two people, but also that the prosecution's timeline at trial was incorrect.

C. The Suppressed Evidence Regarding A Different Perpetrator And From Witnesses Who Had Been In The Alley Supports An Alternative Theory Of The Crime

Petitioners would have used the evidence regarding McMillan and supported it with the evidence from Luchie and Watts as well as the objective crime-scene evidence to present to the jury an alternative theory of the crime. That theory would have been at least as credible as the prosecution's theory, which had only its flawed witnesses to sustain it.

1. The government contends that petitioners at trial would not have pursued this alternative theory, and instead adhered to their original strategy of accepting the prosecution's theory of the crime and simply trying to establish doubt as to themselves—that is, a defense of "not me, maybe them." Br. 62-63. That contention again cannot be reconciled with Ms. Roberts's testimony. Ms. Roberts was counsel to Alphonso Harris, against whom the prosecution's case was sufficiently weak that the government now claims his acquittal was "perfectly logical and not surprising." Br. 86 (internal quotation marks and alterations omitted). Nevertheless, she testified in the post-conviction proceeding that she "certainly" would have used the alternative-perpetrator evidence to present the jury with an alternative theory of the crime. 5/1/12 Tr. at 1177-1178 (A12549-A12550). If Ms. Roberts would have pursued the theory, other defense counsel would have as well.

The government ignores Ms. Roberts's testimony and instead draws on statements from Russell Overton's brief in his direct appeal. Br. 62-63. But, in determining what strategies lawyers would choose if they had been given all of the evidence, it is unhelpful to use statements from a lawyer who is engaging in zealous advocacy using the defense left available to him. It is also unbecoming. Having tilted the playing field by suppressing evidence, the government should not gloat that the ball rolled downhill.

To be sure, if a prosecution witness had not named their client, competent defense counsel would likely note that fact in closing. But that is not inconsistent with affirmatively presenting the jury with an alternative theory of the crime. What defense counsel would not have done is affirmatively *bolster* the prosecution's witnesses, as some counsel did in the original trial as a result of the government's suppression. See Pet. Br. 14-15.

2. a. The government further suggests that, if petitioners had pursued a common, alternative theory, they would not have developed the objective crime-scene evidence. Br. 59-61. But that evidence is obviously part of the evidentiary record against which the materiality of the suppressed evidence is measured. *United States* v. *Agurs*, 427 U.S. 97, 112 (1976). In any event, the government's argument is profoundly counterintuitive; it asks the Court to accept that, if petitioners had presented an alternative theory that the crime was committed by one or two people (McMillan and perhaps an accomplice), they would not have used objective evidence indicating the crime was committed by one or two people.

The government again draws on statements made in support of the "not me, maybe them" defense as evidence of how petitioners would have argued the alternative theory to the jury. Br. 60. Those statements are particularly unrevealing in this context, because lawyers using that defense embraced that a large group attacked Mrs. Fuller, arguing only that the jury should doubt whether the group was so large as to include their client. With the exception of the argument advanced by counsel to Levy Rouse, that is all that was done in the statements identified by the government. *Ibid.* And, as to the argument on behalf of Rouse that Alston and Bennett committed the crime together, counsel did not develop that argument before closing and the argument was improbable given that Alston and Bennett did not know each other at the time of the murder. Pets. Br. 39 n.12.

b. Petitioners would have developed the objective crime-scene evidence if they had presented the alternative theory because such evidence would have affirmatively supported that the crime was committed by one or two people. It also would have devastated the prosecution's case in numerous respects:

- *Where the group attack occurred.* The government's evidence at trial was that the group and Mrs. Fuller entered the alley on the 8th Street side and the attack began soon thereafter. Br. 11-12. But the objective crime-scene evidence indicated that the assault took place on the *9th Street side* of the alley, where Mrs. Fuller's coat, hair curlers, and umbrella were found. A2224-A2226.

- *The number of participants in the group attack.* The government describes a "chaotic scene" where first a set of seven defendants physically attacked Mrs. Fuller and then a second set of five defendants did so. Br. 11-12. In the second attack, the government claims, Mrs. Fuller defended herself by kicking and swinging her fists. That account is flatly contradicted by the physical evidence. If so many people had attacked Mrs. Fuller and she had fought back, one would expect to "see global injuries to the victim," as well as restraint marks. A2240, A2244; see A2142. Mrs. Fuller had no restraint marks, and her injuries were localized. A2143-A2144, A2169, A2177-A2178, A2240-A2241, A2244.

- *The sexual assault in the garage.* The government embraces the trial testimony that two people held down Mrs. Fuller's legs (although the witnesses described different people) while Rouse sodomized her with an object. Br. 12-13. At trial, the prosecution sought to reconcile that testimony with the crime-scene evidence by asserting that Mrs. Fuller's body was moved after she was sodomized. J.A. 156. But the

> crime-scene evidence belies the proposition that the victim was moved, and the government has conceded as much. *E.g.*, Pets. Br. 22. The government now offers no explanation whatsoever as to how the key event in the murder can be squared with its account of the crime—that is, how numerous people participated in the sodomy of Mrs. Fuller in the cramped corner of the garage. Pets. Br. 3-4, 38-39.

The government acknowledges that "no physical evidence linked petitioners to the crime" except for Catrina Ward's testimony that she saw blood on Rouse's pants, Br. 83—which is not physical evidence at all, but rather testimony from an impeached witness. See pp. 12-13, *infra*. The government also notes that petitioners' experts agreed with the medical examiner at trial that it was impossible to say the exact number of people who attacked Mrs. Fuller. Br. 61-62. That is a red herring; petitioners' experts agreed that, although they could not give an *exact* number of participants in the assault, it was, within a reasonable degree of certainty, one to three assailants and certainly not a large group. Pets. Br. 22. Indeed, when asked what his opinion would be if the Archbishop of Washington had testified that he saw eight or ten people attacking Mrs. Fuller, petitioners' crime-scene expert answered, "If he said he saw kicking and punching of this victim I would say he's incorrect." A2251.

3. Especially in light of the objective crime-scene evidence, the government's contention that the evidence against petitioners at trial was overwhelming lacks merit. See, *e.g.*, Br. 52, 76, 80, 87.

a. Even without the alternative theory and objective crime-scene evidence, the prosecution did not present an overwhelming case. To begin with, the evidence could not have been overwhelming if, as the government argues, the

acquittal of two defendants "was 'perfectly logical.'" Br. 86 (quoting A1738). The length of the jury's deliberations itself suggests that it struggled with the evidence. Before returning any verdicts, the jury deliberated for seven days and even then it remained deadlocked as to two defendants. Br. 22. While the government notes that the trial itself was lengthy, Br. 78, seven-day jury deliberations are uncommon even in serious criminal cases. See Thomas Brunell, et al., *Factors Affecting the Length of Time a Jury Deliberates: Case Characteristics and Jury Composition*, 5 Rev. of Law & Economics 555, 568 (2009).

It is unsurprising that the jury apparently had reservations. As the lead prosecutor told the jury, the prosecution's witnesses were not appealing. J.A. 193, 238-239. And, while the government seeks to impose order on those witnesses' conflicting accounts, Br. 11-15, the government's narrative omits disagreements about "important matters" and the witnesses' contradictions of their prior statements. Pet. App. 6a-8a; Pets. Br. 11-14.

The government does not dispute the lead prosecutor's observation that the jury was not willing to convict anyone based only on the testimony of Alston and Bennett, the government's star witnesses. A1741; see Br. 13. And two other purported eyewitnesses, Eleby and Jacobs, were subject to "extensive impeachment"—especially Eleby, whose testimony the trial court instructed the jury to "scrutinize[] with care." Br. 71, 75.[2]

Indeed, the prosecution's case was so weak that the lead prosecutor later described the testimony of a single

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[2] The government claims that Jacobs's testimony was "believable" because she displayed emotion when asked about the sexual assault. Br. 75. But a jury would not overlook Jacobs's "significant credibility problems" because she displayed emotion, just as the original jury did not overlook Alston's and Bennett's credibility problems because they displayed similar emotion. Pet. App. 6a; Pet. Br. 16.

witness, Maurice Thomas, as being the "turning point" in the trial. A1737. Notably, however, Thomas's testimony diverged dramatically from every other account. Compare Br. 12 with Br. 14. Instead of Rouse and Charles Turner striking Mrs. Fuller, Thomas said it was Timothy Catlett. And, instead of Mrs. Fuller fighting back, Thomas's testimony suggests Mrs. Fuller did not resist as she was patted down. Thomas's testimony also changed over time. Although the government seeks to argue away those changes, Br. 73-74 n.9, his testimony was unambiguous: Thomas told the grand jury that he was by the alley on the other side of 9th Street. *Ibid.* At trial, however, Thomas said that he "wasn't standing right on the alley part where the fence [was] at." A630. Thomas also told the grand jury that a group watched the attack on Mrs. Fuller from close to a house that is on "9th and I." A1953. But at trial, Thomas put the observing group "closer to Eighth Street," on the far side of the attacking group. A641.

The government notes that witnesses also testified about incriminating statements purportedly made by petitioners. Br. 16-18. But there is good reason to think the jury put little stock in that testimony. For example, a detective testified that he overheard Christopher Turner and Overton make ambiguous statements after they were arrested. Br. 17-18; Overton Br. 10. But those are the two petitioners as to whom the jury could not reach a verdict for two additional days. Br. 22.

Most of the testimony of purported incriminating statements comes from impeached witnesses like Kaye Porter. See Br. 18, 75. For example, the government points to three inculpatory statements that Ward testified Rouse had made. Br. 17. But Ward did not testify about those statements before the grand jury, when she was dating Rouse. Br. 18. By the time of trial, she was dating

Bennett; and she had inculpated Bennett before the grand jury, only to exculpate him at trial. Br. 17, 19; A762-A764. Ward's about-face crystallizes the weaknesses of the prosecution's witnesses.

In explaining to a reporter years later why this case "easily could have gone the other way," the lead prosecutor said: "[L]ook at the witnesses we had. * * * They were inarticulate, they were drug-involved, they were not very well-educated. They weren't that smart." A1758. In fact, the lead prosecutor was concerned that the witnesses would "make things up" when speaking with investigators, because they were "unconcerned, cold and cold-hearted, * * * * [and] did not see the consequences of their lying in some ways." A1737.

The government suggests that the lead prosecutor had that view only early in the investigation, Br. 78, but he described the witnesses to the jury in the same terms, and acknowledged with regret the lies they had told and the deals the prosecution had struck to secure their testimony. J.A. 193, 238-239. An experienced trial lawyer does not belittle his witnesses before the jury for no reason; the lead prosecutor no doubt did so because he perceived that the jury had similar reservations.

b. The jury's reservations about the prosecution's case would only have grown if it had heard petitioners' alternative theory. See, *e.g.*, *Kyles*, 514 U.S. at 449 n.19. In petitioners' original trial, petitioners did not question that a group attack had occurred. The evidence implicating McMillan would have called the very notion of a group attack into question. It accordingly would have created doubts regarding any witness who claimed to see one. And, as the jury considered those doubts, the contradictions in the testimony from the prosecution's witnesses would have loomed even larger than they did in petitioners' original trial.

The jury's doubts would have been further deepened by the objective crime-scene evidence, which contradicts the testimony from the prosecution's witnesses that a large group attacked Mrs. Fuller. See p. 9-10, *supra*. The objective evidence further contradicts specific points in the witnesses' testimony. See, *e.g.*, Pets. Br. 23. For example, multiple witnesses testified that the perpetrators forcibly restrained Mrs. Fuller, but she had no injuries consistent with having been restrained. Compare, *e.g.*, A2240-A2242 with, *e.g.*, A410-A411, A497-A488, A553-A554. Yarborough's videotaped statement, on which the government also relies, contained that error as well as numerous others. See A1044-A1045, A1054-A1055; Pets. Br. 7-8.

When confronted with objective evidence illustrating the problems with the testimony of the prosecution's witnesses, the jury would have harbored doubts about whether the witnesses were testifying falsely. Indeed, as to the vast majority of the prosecution's witnesses, who the lead prosecutor described as "cold-hearted," a motive for false testimony was readily apparent: the witnesses had decided to "make things up" in an effort to extricate themselves or their friends. A1737. Many witnesses, like Melvin Montgomery, were trying to extricate themselves from an arrest or threat of arrest. *E.g.*, A322 (Montgomery); 12/3/85 Tr. at 574 (A10433) (Taylor). Others, like Jacobs, were trying to extricate their friends. See, *e.g.*, A2298-A2299 (Jacobs claiming to have witnessed crime when challenged on why her friends were innocent); A1025 (Eleby making similar claims). And most witnesses were subjected to aggressive interrogations from which they would want to extricate themselves. Pet. App. 15a n.11; A2282-A2283, A2298-A2299, A2594-A2595.

Regardless of the reason, the jury would have considered whether the "not very smart" witnesses had made a

short-sighted decision to falsely claim they had seen either a group discuss committing a robbery or some portion of an attack. J.A. 193. The witnesses would have been given unwitting assistance from the detectives and prosecutors, who admit that they used information from other sources when questioning witnesses. A2427, A2569-A2570. Accordingly, in making a statement, witnesses were able to draw on what they learned, and their friends had previously learned, from the detectives' questions as well as their own knowledge of Mrs. Fuller and the neighborhood.

The jury would have also doubted whether the testimony from the two cooperating witnesses was truthful. Both Alston and Bennett gave statements after being arrested that were contradicted by the objective crime-scene evidence. *E.g.*, Pets. Br. 5-8.[3] And both thought their statements would extricate them from the case. After giving his statement, Alston asserted that he "didn't have nothing to do with" the murder and wanted to "live [his] life like a free man." A1175. And Bennett told detectives that his statement "[m]ore likely [is] gonna help me than * * * help you." A1078-A1079. Although both later pleaded guilty, the jury would have considered whether they had made "all-too-rational" decisions under aggravating circumstances. CWCY Br. 10. Alston had been raped in prison, and Bennett had been arrested for drug dealing and robbery. A419-A426; Pets. Br. 11.

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[3] The same is true for Yarborough's videotaped statement. See p. 14, *supra*. And a jury would have had similar reasons to question Yarborough's prior transcribed statement. After being threatened with arrest and enduring hours of interrogation, Yarborough implicated Harris, Rouse, and Charles Turner, all of whom were already subjects of the investigation. A1178-A1180; Pets. Br. 4-5; see A1375. Yarborough also identified at least five other people who were never indicted. Br. 6.

In short, petitioners would have used the suppressed evidence to present an alternative theory that McMillan was responsible for the crime. To a jury that heard that theory, and the objective crime-scene evidence that would have supported it, the prosecution's case would have been anything but overwhelming.

D. The Prosecution Suppressed Additional Information That Cast Doubt On The Investigation And Impeached Its Witnesses

As to the suppressed information petitioners identified as casting doubt on the investigation and impeaching the prosecution's witnesses, the government does not dispute that practically all of that information was favorable. Instead, the government principally seeks to downplay the relevance of that information. But especially to a jury considering petitioners' alternative theory of the crime, that evidence would have deepened their doubts regarding the prosecution's case.

1. The government does not dispute that detectives' mishandling of Davis's statement identifying Blue as the murderer was favorable to the defense. Br. 67. It argues only that the jury would have considered the error to be a "minor slip-up" because investigators interviewed 400 other people (the vast majority of which did not inculpate petitioners). Br. 68. What makes an error "minor" is not the number of other steps taken, but rather the character of the error and its effect on the "reliability of the investigation." *Kyles*, 514 U.S. at 446. Davis's statement provided a strong lead. Yet the statement was misplaced for nine months, during which time investigators developed what would become the prosecution's case. Petitioners would have argued that the flaws in how the case was investigated resulted in the flawed testimony of the prosecution's purported eyewitnesses.

2. The prosecution also suppressed information that would have further impeached Eleby, Porter, and Jacobs and further undermined the reliability of the investigation. The government's responses concerning that information lack merit.

a. The government concedes that all of the suppressed information except that pertaining to Jacobs's harsh interrogation was favorable to the defense. Br. 72. As to Jacobs's interrogation, the government cannot deny that "the probative force of evidence depends on the circumstances in which it was obtained." *Kyles*, 514 U.S. at 446 n.15. It surely impacts the probative force of Jacobs's testimony that she claimed to witness the crime only after an interrogation that the lead prosecutor, who witnessed it, described as "very dramatic and shocking." A2299. The lead prosecutor's testimony was equally clear that Jacobs immediately recanted her statement—that is, after Jacobs stated she saw the crime, "she said she didn't see it." A2299. The prosecution should have informed petitioners of the means by which the statement was taken and that Jacobs immediately recanted it. See *United States* v. *Rodriguez*, 496 F.3d 221, 225-227 (2d Cir. 2007).

b. Although the government elides the effect of the suppressed evidence regarding Eleby, Porter, and Jacobs on the reliability of its investigation, Br. 68-72, the jury surely would have attached weight to it in its deliberations. As to each witness, the prosecution suppressed evidence that should have given prosecutors pronounced pause about the witness. The lead prosecutor knew that Eleby was high on PCP while meeting with investigators and identifying suspects; that Porter had accompanied Eleby to Eleby's initial meeting with investigators to lie to them about witnessing a suspect confess (which was particularly troubling because Porter was to testify at trial that another defendant confessed to her); and Jacobs

only claimed to witness the crime after a heated interrogation. This information revealed that the prosecution had a "remarkably uncritical attitude" regarding its witnesses, even in the face of the obvious flaws in their testimony. *Kyles*, 514 U.S. at 445.

c. This suppressed evidence would have also further undermined the credibility of Eleby, Porter, and Jacobs. Although the government is correct that these three witnesses were subjected to "extensive impeachment" at trial, Br. 75, additional impeachment of a witness whose credibility is "already impugned" is, if anything, more relevant to the jury and thus likely to be material. *Wearry*, 136 S. Ct. at 1006-1007.

3. Finally, as to the suppressed information concerning Thomas, the government claims that the jury would have assumed Thomas's aunt was lying when she told investigators that she did not recall being told about the assault, because Thomas testified that she told him not to discuss what he saw. Br. 73. But there is no indication that the investigators themselves thought she was lying. A1010. The inability of Thomas's aunt to corroborate his testimony would have been useful to petitioners in further undermining Thomas's credibility.

E. When Considered Cumulatively, The Suppressed Information Was Material

Petitioners' case is unusual in the breadth of evidence suppressed by the prosecution. As is often the case when *Brady* violations arise in cases built on witness testimony, the prosecution suppressed evidence impeaching its witnesses. See *Wearry*, 136 S. Ct. at 1006-1007; *Smith*, 565 U.S. at 76. Here, however, the prosecution also suppressed information of an altogether different kind—evidence identifying an alternative perpetrator and witness

statements consistent with that perpetrator having committed the crime.

1. The familiar *Brady* materiality asks only whether the suppressed evidence gives rise to "a reasonable probability" of "a different result." *E.g.*, *Kyles*, 514 U.S. at 422. The government acknowledges that a "reasonable probability" is a lower probability than more likely than not, and that a "different result" merely requires that the jury possess a reasonable doubt. Br. 52, 76, 81. Applying that standard, this Court has found suppressed evidence to be material even in the face of substantial evidence of guilt. See *Smith*, 565 U.S. at 76; *id.* at 79, 81-83 (Thomas, J., dissenting); *Wearry*, 136 S. Ct. at 1003-1006; *id.* at 1010-1011 (Alito, J., dissenting); *Kyles*, 514 U.S. at 431, 452-454.

Under this Court's *Brady* precedents, suppressed evidence is material if a reviewing court is not confident the jury "*would*" reject inferences that could be drawn in the defendant's favor from the suppressed evidence. *Smith*, 565 U.S. at 76 (emphasis in original); *Kyles*, 514 U.S. at 453. The Court cannot have confidence that a jury would have done so here. Petitioners' alternative theory implicating McMillan is not only plausible, it actually better aligns with the objective crime-scene evidence.

To be sure, the prosecution offered the testimony of many witnesses, including one (Thomas) who did not have an obvious motive to lie. Br. 76-77. And although those witnesses gave varying accounts and were impeached, even a jury that heard petitioners' alternative theory may still have wondered why numerous witnesses would testify to a group having attacked Mrs. Fuller if such an attack had not occurred. But the jury would also have had significant questions about the prosecution's case:

- Why did McMillan, with his history of assaulting middle-aged women, run into the alley only to linger by the garage approximately 30

minutes after groans were heard coming from the garage?

- Why was McMillan acting suspiciously, hiding something under his jacket, and not talking to his girlfriend?
- Why were the doors to the garage closed when Mrs. Fuller's groans were heard coming from the garage but open a half-hour later?
- And why did the accounts of the prosecution's witnesses contradict the objective, crime-scene evidence regarding the injuries to Mrs. Fuller and the location of her body?

This Court can have no confidence that a jury would have resolved all of those questions in the prosecution's favor, as would have been necessary to eliminate reasonable doubt. Indeed, one could resolve those questions in the government's favor only by impermissibly "emphasiz[ing] reasons a juror might disregard new evidence while ignoring reasons she might not." *Wearry*, 136 S. Ct. at 1007; see Pet. App. 49a-54a.

When considering suppressed evidence in a case with an alternative-perpetrator defense, a court "[p]erhaps" could retain confidence in a guilty verdict if the physical evidence of guilt was "above suspicion" or if purported eyewitnesses "were free of impeachment." *Kyles*, 514 U.S. at 454. But neither option is available to the government here. Unlike in *Kyles*, no physical evidence inculpates the defendants. To the contrary, the objective crime-scene evidence actually contradicts the prosecution's case. And the prosecution's witnesses were never "free of impeachment," and certainly would not have been in a trial in which petitioners used the objective crime-scene evidence and suppressed impeachment evidence to further attack the witnesses' credibility.

2. If the suppressed information had been available to petitioners, they would have presented a radically different defense. In place of the "not me, maybe them" defense, petitioners would have presented an alternative theory that McMillan was responsible for Mrs. Fuller's death. And, instead of acquiescing to the prosecution's theory of the crime, petitioners would have contradicted the prosecution's proof regarding where Mrs. Fuller was attacked, how many people participated, where the sodomy occurred, and even when the crime took place. The D.C. Court of Appeals was entirely correct when it observed that petitioners would have challenged the prosecution's theory of "the basic structure of how the crime occurred." Pet. App. 54a.

That is a virtue of petitioners' claim, however, not a vice. Here, the suppressed evidence, taken cumulatively, "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435.

F. The Court Should Clarify That Evidence Developed After Trial May Be Considered In Evaluating The Materiality Of Evidence Suppressed Before Trial

The similarities between the murder of Mrs. Fuller and the murder McMillan committed in 1992 are staggering. Both victims were attacked in alleys, "dragged" to where they were assaulted, had items of clothing removed along the way, and were beaten. Br. 31-32. Most disturbingly, McMillan and Mrs. Fuller's killer "stripped [both victims] naked from the waist down, pushed up [their] sweater[s], and sodomized [them]." Br. 32. Those similarities are relevant to the Court's consideration of the suppression of evidence regarding McMillan's presence at the crime scene, for two reasons.

First, the similarities show how petitioners' original trial would have been different. Br. in Opp. 19. The government does not challenge that McMillan's subsequent murder indicates that petitioners would have been able to develop evidence that McMillan had a proclivity for sodomy and sexual violence and that he was capable of inflicting injuries similar to those sustained by Mrs. Fuller by himself. Pets. Br. 49-50.

Second, the similarities themselves point to McMillan's responsibility for Mrs. Fuller's murder. If *Brady*'s "overriding concern" is to remain "the justice of the finding of guilt," *Agurs*, 427 U.S. at 112, but see Br. 64, the Court should make explicit that in considering materiality through the lens of how the retrial would proceed, post-trial evidence that bears on the materiality of withheld evidence should be considered. See *Wood* v. *Bartholomew*, 516 U.S. 1, 8 (1995) (per curiam); *Kyles*, 514 U.S. at 453 n.22.

* * * * *

"'[F]airness' cannot be stretched to calling this a fair trial." *Kyles*, 514 U.S. at 454. The prosecution suppressed evidence that would have given rise to a defense theory that someone else was responsible for the crime. In presenting that alternative theory to the jury, petitioners would have challenged the prosecution's case on practically every aspect of the crime. There is accordingly not just a "reasonable probability," but a pronounced likelihood, that the result of petitioners' trial would have been different if petitioners had been able to pursue that theory. *E.g.*, *id.* at 422. The District of Columbia Court of Appeals erred when it rejected petitioners' *Brady* claim, and its judgment should accordingly be reversed.

Respectfully submitted.

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In the
Supreme Court of the United States

CHARLES S. TURNER, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

RUSSEL L. OVERTON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writs of Certiorari to the District of Columbia Court of Appeals

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February 3, 2017

QUESTION PRESENTED

In *Brady v. Maryland*, this Court announced that it violates due process when the prosecution fails to disclose material information favorable to the accused. 373 U.S. 83, 87 (1963). The question presented is whether Petitioners' convictions must be set aside under *Brady*.

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STATEMENT OF INTEREST[1]

Founded in 1977, *amicus curiae* Cato Institute is a nonpartisan public policy research organization dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato established the Center for Constitutional Studies in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files amicus briefs. This case is of central concern to Cato because the decision below threatens to erode the constitutional right to a fair trial enshrined in the Due Process Clause of the Fifth Amendment.

SUMMARY OF ARGUMENT

I. In its seminal decision in *Brady v. Maryland*, this Court held that a State violates due process if it withholds "material" evidence favorable to the accused. 373 U.S. 83, 87 (1963). The Court subsequently clarified that "evidence is 'material' within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Cone v. Bell*, 556 U.S. 449, 469-70 (2009).

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae* and its counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel of record for all parties have consented to this filing in letters on file with the Clerk's Office.

The lower court in this case severely misapplied *Brady*'s materiality standard. According to the D.C. Court of Appeals, evidence that contradicts "the basic structure of how the crime occurred" is material under *Brady* only if there is "a reasonable probability that [such] evidence ... would have led the jury to doubt *virtually everything* that the government's eyewitnesses said about the crime." *Turner v. United States*, 116 A.3d 894, 926 (D.C. 2015). That heightened standard is contrary to this Court's repeated teachings in *Brady* and its progeny. Indeed, the decision below gets things exactly backwards: when the evidence in question concerns something as central as the *manner in which the crime was committed*, that should, if anything, counsel in favor of a less-demanding materiality standard, not a heightened one.

Unfortunately, the decision below is nothing new. For years, lower courts have been attempting to raise the threshold for materiality under the *Brady* doctrine, and this Court has repeatedly found it necessary to intervene to ensure that *Brady* remains a meaningful protection against prosecutorial overreach. This case represents yet another attempt to depart from *Brady*'s constitutional requirement by ratcheting up the materiality standard. The outcome should be the same as in the many previous cases in which this Court reversed attempts to artificially narrow the *Brady* doctrine.

II. The D.C. Court of Appeals' heightened materiality standard has implications far beyond the present case. *Brady* violations, by nature, are

difficult to detect: Defendants must show that prosecutors withheld material evidence, which by definition requires defendants to discover that which has been concealed from them. Moreover, in light of the absolute immunity enjoyed by prosecutors for claims brought under 42 U.S.C. §1983, a vigorous application of the *Brady* doctrine is the only meaningful check against the unconstitutional withholding of exculpatory evidence. Especially in borderline cases, the D.C. Court of Appeals' heightened materiality standard for evidence of "how the crime occurred" may encourage prosecutors to err on the side of withholding such evidence when *Brady* and its progeny would otherwise require disclosure. In all events, *Brady* seeks more than just outcomes; its primary function is to expose truth. The D.C. Court of Appeals deviated from that principle, and its decision will make it far more difficult to detect and root out prosecutorial misconduct.

If allowed to stand, the D.C. Court of Appeals' misapplication of *Brady* would also upend the incentive scheme created by that decision. An extensive body of empirical research has found that *Brady* violations occur with alarming regularity. Yet the decision below further opens the door to such violations by making it, in the D.C. Court of Appeals' own words, "quite difficult" to overturn convictions via *Brady*. This Court should avoid that constitutionally dubious result and reverse the decision below.

ARGUMENT

I. The Decision Below Misinterprets *Brady v. Maryland* And Its Progeny.

The lower court's opinion, while claiming reliance on this Court's precedent, all but rewrites *Brady* and its progeny. Specifically, the D.C. Court of Appeals narrowed the circumstances in which convictions will be overturned for prosecutorial nondisclosure. In so doing, the court misconstrued *Brady* and subverted the incentive structure affixed by that decision. Reflecting the Constitution's overriding concern "that justice shall be done in all criminal prosecutions," *Cone*, 556 U.S. at 451 (citation omitted), *Brady* was designed to, among other things, safeguard against the withholding of exculpatory evidence. The D.C. Court of Appeals' decision undermines that objective and undercuts the sole meaningful protection against prosecutorial misconduct in withholding evidence favorable to the accused.

A. The Decision Below Departs from *Brady* by Artifically Heightening the Threshold for Materiality.

In *Brady v. Maryland*, this Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. The Court has since instructed that favorable evidence is "material" for *Brady* purposes "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding

would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). In this regard, a defendant seeking relief under *Brady* need not show that he "more likely than not" would have been acquitted had the withheld evidence been disclosed. *Smith v. Cain*, 565 U.S. 73, 75 (2012). Instead, the defendant must show only that the withheld evidence "'undermines confidence in the outcome of the trial.'" *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

The decision below, however, announced a drastic change to that seemingly settled doctrine by applying a standard for materiality that bears little resemblance to the standard set forth in *Kyles* ("undermines confidence in the outcome of the trial"). According to the D.C. Court of Appeals, when withheld evidence undermines "the basic structure of how the crime occurred," a showing of materiality under *Brady* "requires a reasonable probability that [such] evidence ... would have led the jury to doubt *virtually everything* that the government's eyewitnesses said about the crime." *Turner*, 116 A.3d at 926.

If allowed to stand, the decision below would significantly heighten the threshold for *Brady* materiality when withheld evidence contradicts the way in which a crime occurred. That much is evident from the D.C. Court of Appeals' own opinion: "This makes the burden on appellants to show materiality quite difficult to overcome." *Id.* at 926. But that approach to materiality under *Brady* gets things exactly backwards: when the evidence at issue goes to the central question of the manner in which the crime occurred—or, as in this case, *the identity of the*

person who committed the crime—the standard of materiality should, if anything, be *lower*, not higher. This is precisely the type of evidence that is *most likely* to be useful to the defendant as he prepares his defense.

Central to the reasoning of *Brady* is the notion that an overly high bar for materiality undermines the "truth-seeking function of the trial process." *United States v. Agurs*, 427 U.S. 97, 104 (1976). Indeed, in developing the *Brady* materiality rule, this Court has been careful "to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations." *Kyles*, 514 U.S. at 440. To that end, the Court has routinely rejected a demanding definition of materiality. *See, e.g.*, *Smith*, 565 U.S. at 75-76 ("A reasonable probability does not mean that the defendant 'would more likely than not have received a different verdict with the evidence,' only that the likelihood of a different result is great enough to 'undermine[] confidence in the outcome of the trial.'") (citation omitted); *Kyles*, 514 U.S. at 434-35 (materiality "is not a sufficiency of evidence test"); *Agurs*, 427 U.S. at 111 ("[T]he defendant should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal.").

The rationale underlying this Court's understanding of materiality is no less applicable where, as here, the withheld evidence pertains to "the basic structure of how the crime occurred." *Turner*, 116 A.3d at 926. As Petitioners maintain,

"[t]he suppressed evidence in this case is of a type and importance that is rarely seen in criminal trials." Pet. Br. 27. Evidence of "how the crime occurred" is central to the guilt or innocence of criminal defendants, and thus fundamental to the "truth-seeking function of the trial process," *Agurs*, 427 U.S. at 104.

Yet the D.C. Court of Appeals took precisely the opposite tack by imposing an artificially high materiality standard for *only* this one category of highly relevant evidence. That carve-out makes no sense on its own terms and cannot be squared with this Court's long line of *Brady* decisions.[2]

B. This Court Has Been Vigilant in Ensuring That Lower Courts Do Not Improperly Raise the *Brady* Materiality Standard.

The D.C. Court of Appeals' departure from *Brady* and its progeny is unfortunately not an aberration. The decision below is just the most recent in a long

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[2] As Petitioners explain, the lower court departed from the *Brady* line of cases in other ways as well. For example, "the [D.C.] Court of Appeals' decision is rife with speculation emphasizing 'reasons a juror might disregard' the suppressed evidence in this case." Pet. 22 (citation omitted); *see also Smith*, 565 U.S. at 76 (rejecting the State's argument that materiality should hinge on what "the jury could have disbelieved," rather than what the jury "would" have disbelieved). Moreover, the decision below "failed to meaningfully engage in a cumulative analysis of the withheld evidence in the context of the existing evidentiary record." Pet. 23; *see also Kyles*, 514 U.S. at 421 ("[T]he state's obligation under *Brady* ... turns on the cumulative effect of all ... evidence suppressed by the government").

line of attempts by lower courts to heighten the *Brady* materiality standard. This Court found it necessary to reverse the lower court in each of those cases, and should do so again here.

1. In *Kyles v. Whitley*, 514 U.S. 419 (1995), the petitioner sought federal habeas relief following his conviction for first-degree murder. The petitioner argued, among other things, that the State obtained the conviction in violation of *Brady*. According to the petitioner, the prosecution failed to disclose various eyewitness accounts, statements made by an informant who was never called to testify, and a document listing the license plate numbers of cars parked at the crime scene on the night of the murder. *Id.* at 428-29. The Fifth Circuit denied postconviction relief on the ground that the withheld evidence was immaterial.

This Court squarely rejected the Fifth Circuit's application of the *Brady* line of cases. Notably, the Court made clear that materiality is defined "in terms of suppressed evidence considered collectively, not item by item." *Id.* at 436. In other words, "the [S]tate's disclosure obligation turns on the cumulative effect of all suppressed evidence favorable to the defense, not on the evidence considered item by item." *Id.* at 420. The Fifth Circuit, however, had taken precisely the opposite approach, conducting "a series of independent materiality evaluations, rather than the cumulative evaluation required" by *Brady*. *Id.* at 441. The lower court's opinion "contain[ed] repeated references dismissing particular items of evidence as immaterial and so suggesting that cumulative materiality was not the touchstone." *Id.*

at 440. As a result, this Court reversed the judgment of the Fifth Circuit.

2. In *Smith v. Cain*, 565 U.S. 73 (2012), the petitioner sought collateral relief following his conviction for first-degree murder. The petitioner claimed that the prosecution violated *Brady* when it failed to disclose an investigator's notes stating, among other things, that the sole witness linking petitioner to the crime could not describe the perpetrator with specificity. *Id.* at 73-76. The state trial court rejected petitioner's *Brady* claim, finding that the withheld evidence was immaterial. The state appellate courts denied review.

This Court vacated the state trial court's decision, and reaffirmed that withheld evidence favorable to the accused is material under *Brady* if the evidence would "'undermine confidence in the outcome of the trial.'" *Id.* at 75-76. The Court held that the undisclosed notes were "plainly material" because the notes "directly contradict[ed]" the "only evidence linking [petitioner] to the crime." *Id.* Although the State offered a number of "reason[s] that the jury *could* have disbelieved [the] undisclosed statements," the State gave the Court "no confidence that [the jury] *would* have done so." *Id.*

3. In *Wearry v. Cain*, 136 S. Ct. 1002 (2016), the petitioner sought postconviction relief after a jury found him guilty of capital murder. The petitioner alleged that his due process rights had been violated under *Brady* when the prosecution failed to disclose several witnesses who could have corroborated the petitioner's alibi. *Id.* at 1004-05. Although the state postconviction court acknowledged that the

prosecution "probably ought to have" disclosed the withheld evidence, *id.* at 1005 (citation omitted), the court nevertheless denied relief. The Louisiana Supreme Court affirmed.

This Court reversed. Not only did the state postconviction court "improperly evaluate[ ] the materiality of each piece of evidence in isolation rather than cumulatively," but it also "emphasized reasons a juror might disregard new evidence while ignoring reasons she might not." *Id.* at 1007. "Beyond doubt," this Court opined, "the newly revealed evidence suffices to undermine confidence in [petitioner]'s conviction." *Id.* at 1006. The Court stressed that the government's evidence cannot "resemble[ ] a house of cards," such that where "the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *Id.* (quoting *Agurs*, 427 U.S. at 113).

* * *

Despite this Court's repeated teachings to the contrary, a lower court has once again sought to raise the bar on the standard for disclosing *Brady* evidence. The D.C. Court of Appeals' "doubt virtually everything" standard of materiality has no basis in this Court's precedent or common sense. This Court has consistently rejected such maneuvers in past cases, and it should do so again here.

II. Raising The *Brady* Materiality Bar Would Significantly Undermine Prosecutors' Incentives To Disclose Potentially Exculpatory Evidence.

The D.C. Court of Appeals' decision to heighten the threshold for *Brady* materiality carries consequences far beyond the present dispute by upending the incentive scheme that underlies *Brady* and its progeny. If allowed to stand, the lower court's gross misapplication of *Brady* will undermine the very purpose of that doctrine—to ensure that prosecutors have powerful incentives to disclose relevant evidence favorable to the accused.

A number of recent studies have shown that, despite this Court's clear instructions about prosecutors' obligation to disclose exculpatory evidence, *Brady* violations remain unfortunately common. *See* Kathleen M. Ridolfi, Tiffany Joslyn & Todd Fries, Nat'l Ass'n of Criminal Def. Lawyers, *Material Indifference: How the Courts Are Impeding Fair Disclosure in Criminal Cases* (2014) (*available at* http://bit.ly/2jZdMlu). Put simply, "[t]here is an epidemic of *Brady* violations abroad in the land," and "[o]nly judges can put a stop to it." *United States v. Olsen*, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, J., dissenting). Yet the decision below actually *encourages Brady* violations by making it "quite difficult" to hold prosecutors accountable for withholding exculpatory evidence. That outcome is precisely what this Court's *Brady* doctrine was designed to avoid.

A. The Decision Below Undermines Prosecutors' Incentives To Disclose Potentially Exculpatory Evidence.

The D.C. Court of Appeals' infidelity to *Brady* through its adoption of a "doubt virtually everything" standard for materiality will have far-reaching consequences. Because "[t]he materiality requirement is recognized as the hallmark of the *Brady* doctrine[,]" *United States v. Wedding*, 2009 WL 3805640, at *1 (S.D. Cal. Nov. 12, 2009) (citing *Bagley*), any ratcheting-up of that standard, as in the decision below, can usher in a significant change in prosecutors' incentives to disclose, for several reasons.

1. First, the very nature of *Brady* violations renders it highly unlikely that prosecutorial misconduct will come to light in the first place. *See* Kathleen M. Ridolfi & Maurice Possley, N. Cal. Innocence Project, *Preventable Error: A Report on Prosecutorial Misconduct in California 1997-2009* (2010) (*available at* http://bit.ly/2jH8KJn) ("*Brady* violations are, by their nature, difficult to uncover; they become apparent only when the withheld material becomes known in other ways."); Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 Iowa L. Rev. 393, 432 (2001) ("*Brady* violations, like most other forms of illegal prosecution behavior, are difficult to discover and remedy."). *Brady* violations are almost always based on evidence outside of the trial record, and "[b]ecause direct appeals offer no opportunity to introduce such evidence, appellate courts cannot make the materiality determination necessary to

adjudicate a *Brady* claim on direct review." Anna Vancleave, *Brady and the Juvenile Courts*, 38 N.Y.U. Rev. L. & Soc. Change 551, 556 (2014).

The onus is thus on convicted defendants to raise *Brady* violations through post-conviction proceedings, where there is no right to counsel and "it is a challenge to even learn that certain evidence was never disclosed." Jenia I. Turner & Allison D. Redlich, *Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison*, 73 Wash. & Lee L. Rev. 285, 299 (2016). Moreover, *Brady* does not require the discovery of exculpatory evidence before a guilty plea. *See United States v. Ruiz*, 536 U.S. 622, 628-33 (2002); *Matthew v. Johnson*, 201 F.3d 353, 361-62 (5th Cir. 2000) ("Because a *Brady* violation is defined in terms of the potential effects of undisclosed information on a judge's or jury's assessment of guilt, it follows that the failure of a prosecutor to disclose exculpatory information to an individual waiving his right to trial is not a constitutional violation."). And because 97% of federal convictions and 94% of state convictions result from guilty pleas (as opposed to trials), *see Missouri v. Frye*, 566 U.S. 133, 142-44 (2012) (citation omitted), prosecutors in the vast majority of cases are under no duty to disclose exculpatory evidence.

Moreover, prosecutors enjoy "absolute immunity" from liability under 42 U.S.C. §1983 for actions taken within the scope of their prosecutorial duties. *Imbler v. Pachtman*, 424 U.S. 409, 428-29 (1976); *see Villasana v. Wilhoit*, 368 F.3d 976, 989 (8th Cir. 2004) ("It is logical to impose *Brady*'s absolute duty

on the government official who will present the State's case at trial, who can be expected to gather material evidence from law enforcement agencies, and who is in the best position to evaluate whether evidence must be disclosed because it is materially favorable to the defense. When acting in those capacities, the prosecutor has absolute immunity from *Brady* damage claims under §1983." (citing *Imbler*)). And, despite *Brady* violations being "one of the most common forms—if not the most common form—of prosecutorial misconduct ... discipline is rarely imposed." Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 B.Y.U. L. Rev. 53, 146 & n.671, 672 (2005). Absent any tangible apprehension by prosecutors of *ex post* liability or punishment for withholding evidence, courts' faithful application of a robust *Brady* doctrine is the only sure remedy to protect defendants' due process rights and ensure that they have full access to potentially exculpatory evidence.[3]

The need for a robust *Brady* doctrine is further underscored by the strong institutional incentives that may deter prosecutors from disclosing evidence

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[3] Of course, prosecutors may be subject to criminal liability or sanctions as a result of violating ethical standards. *See* Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 Ind. L.J. 481, 491 (2009) ("*Brady* violations warrant not only professional discipline, but also civil and even criminal liability."); *see, e.g.*, *In re Brophy*, 83 A.D.2d 975 (1981) (upholding criminal conviction and fine for the "misdemeanor of willfully depriving an individual of rights secured to him by the United States Constitution"). But the likelihood of such sanctions is exceedingly rare, even in cases involving flagrant *Brady* violations.

favorable to defendants. Chief among them, prosecutors are often under immense pressure to obtain high conviction rates. *See* Sonja B. Starr, *Sentence Reduction as a Remedy for Prosecutorial Misconduct*, 97 Geo. L.J. 1509, 1531 n.137 (2009); Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. Rev. 789, 828 (2000) ("[P]rosecutors, who are rewarded for high conviction rates, will adopt a 'conviction psychology' rather than internalizing the 'do justice' standard."); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2463, 2472 (2004); *see* Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 Stan. L. Rev. 869, 903 & n.177 (2009); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. Rev. 125, 156 (2004). Especially in close cases, those structural incentives may lead prosecutors to err on the side of withholding rather than disclosing even potentially relevant evidence.

2. Against this backdrop—in which there is little direct accountability for failing to disclose relevant evidence to the defendant—*Brady* acts as a critical safeguard on criminal defendants' right to a fair trial. *See Connick v. Thompson*, 563 U.S. 51, 105 (2011) (Ginsburg, J., dissenting) (*Brady* "is among the most basic safeguards brigading a criminal defendant's fair trial right."). The "message of *Brady* and its progeny is that a trial is not a mere 'sporting event'; it is a quest for truth in which the prosecutor, by virtue of his office, must seek truth even as he seeks

victory." *Monroe v. Blackburn*, 476 U.S. 1145, 1148 (1986).

Brady, moreover, focuses on system-wide incentives and applies "irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87; *see Agurs*, 427 U.S. at 110 (the "constitutional obligation" under *Brady* is not "measured by the moral culpability, or the willfulness, of the prosecutor"). This blanket protection exists because "even virtuous prosecutors trying to do justice can err in their good-faith attempts to apply the doctrine on its own terms." Burke, *supra* note 3, at 488. Indeed, "the all-too-human tendency to dismiss or discredit conflicting evidence is easily understood." John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 Va. L. Rev. 207, 228-29 (2013); *see id.* at 228 ("*Brady* requires not only that zealous prosecutors help the opposition, but that they do so by crediting a version of the evidence at odds with their understanding. Both common sense and cognitive psychology confirm the difficulty of that task."). Thus, erring on the side of disclosing potentially relevant evidence "will hardly injure the judicial process. Indeed, it will help it." *Imbler*, 424 U.S. at 443 (White, J., concurring).

B. The Decision Below Is Especially Troubling in Light of the Frequency with which *Brady* Violations Occur.

An extensive body of empirical research concerning the frequency of *Brady* violations further underscores that the decision below, if allowed to stand, may have unsettling and far-reaching consequences. As noted above, research shows that

Brady violations are among the most common forms of prosecutorial misconduct. *See* Johns, *supra*, at 146; Davis, *supra*, at 431. Moreover, studies reveal that *Brady* violations "often occur in the same prosecutor's office, are often committed by the same prosecutor," and "occur disproportionately in capital cases." Bennett L. Gershman, *Bad Faith Exception to Prosecutorial Immunity for* Brady *Violations*, Amicus, Harv. Civ. Rights-Civ. Lib. L. Rev. 12-13 (2010) (*available at* http://bit.ly/2kXxlvg).

In one such study, the *Chicago Tribune* surveyed 11,000 homicide convictions between 1963 (the year this Court decided *Brady*) and 1999. Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, Chi. Tribune, at 3 (Jan. 10, 1999, http://trib.in/2kwn7E7). Of those convictions, "at least" 381 were "thrown out because prosecutors concealed evidence suggesting innocence or presented evidence they knew to be false." *Id.* at 1. The *Tribune* ultimately determined that "prosecutors across the country have violated their oaths and the law, committing the worst kinds of deception in the most serious of cases." *Id.* The study also made clear that the 381 overturned convictions "represent[ ] only a fraction of how often such cheating occurs." *Id.*; *see also* Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 Okla. City U. L. Rev. 833, 869 (1997) (asserting that "we have every reason to suspect that there are many more [*Brady* violations] in which the prosecutor's refusal to disclose the exculpatory evidence was never discovered by the defendant or his attorney").

The *Tribune*'s findings accord with other empirical inquiries into the prevalence of *Brady* violations. *See, e.g.*, California Commission on the Fair Administration of Justice, *Report and Recommendations on Reporting Misconduct*, at 3 (2007) (locating 2,130 California cases in which claims of prosecutorial misconduct were raised and finding misconduct in 443, the majority of which involved the suppression of exculpatory evidence); Steven Weinberg, *Breaking the Rules: Who Suffers When a Prosecutor Is Cited for Misconduct?*, Ctr. for Pub. Integrity (June 26, 2003), http://bit.ly/2l0rVii (reviewing 11,452 cases in which allegations of prosecutorial misconduct were scrutinized by appellate courts and finding reversible misconduct—primarily for *Brady* violations—in 2,012 decisions); James S. Liebman, et al., *A Broken System: Error Rates in Capital Cases, 1973-1995*, at 5 (2000) (reporting that prosecutorial withholding of evidence accounted for sixteen to nineteen percent of reversible errors in capital cases); Bill Moushey, *Hiding the Facts: Discovery Violations Have Made Evidence Gathering a Shell Game*, Pittsburgh Post-Gazette, at A-1 (Nov. 24, 1998) (conducting a two-year investigation into 1,500 allegations of prosecutorial misconduct and uncovering "hundreds of examples of discovery violations in which prosecutors intentionally concealed evidence that might have helped prove a defendant innocent or a witness against him suspect").

The results of these studies are anything but an anachronistic trend. In fact, the federal and state reporters confirm that in recent years *Brady* violations have remained a particularly acute

problem for our criminal justice system. *See, e.g.*, *Wearry*, 136 S. Ct. at 1002; *Smith*, 565 U.S. at 73; *United States v. Sedaghaty*, 728 F.3d 885 (9th Cir. 2013); *Aguilar v. Woodford*, 725 F.3d 970 (9th Cir. 2013); *United States v. Kohring*, 637 F.3d 895 (9th Cir. 2010); *Simmons v. Beard*, 590 F.3d 223 (3d Cir. 2009); *Douglas v. Workman*, 560 F.3d 1156 (10th Cir. 2009); *Harris v. Lafler*, 553 F.3d 1028 (6th Cir. 2009); *United States v. Zomber*, 299 F. App'x 130 (3d Cir. 2008); *United States v. Triumph Capital Grp., Inc.*, 544 F.3d 149 (2d Cir. 2008); *United States v. Avilés-Colón*, 536 F.3d 1 (1st Cir. 2008); *People v. Uribe*, 76 Cal. Rptr. 3d 1457 (Cal. Ct. App. 2008); *Miller v. United States*, 14 A.3d 1094 (D.C. 2011); *Deren v. Florida*, 15 So.3d 723 (Fla. Dist. Ct. App. 2009); *Walker v. Johnson*, 646 S.E.2d 44 (Ga. 2007); *Aguilera v. Iowa*, 807 N.W.2d 249 (Iowa 2011); *DeSimone v. Iowa*, 803 N.W.2d 97 (Iowa 2011); *Kentucky v. Bussell*, 226 S.W.3d 96 (Ky. 2007); *State ex rel. Engel v. Dormire*, 304 S.W.3d 120 (Mo. 2010); *Duley v. Missouri*, 304 S.W.3d 158 (Mo. Ct. App. 2009); *People v. Garrett*, 106 A.D.3d 929 (N.Y. App. Div. 2013); *Pena v. Texas*, 353 S.W.3d 797 (Tex. Crim. App. 2011); *In re Stenson*, 276 P.3d 286 (Wash. 2012); *West Virginia v. Youngblood*, 650 S.E.2d 119 (W. Va. 2007).

* * *

Given the alarming regularity of *Brady* violations, it is critical for this Court to reverse the decision below and reaffirm that evidence is material under *Brady* "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been

different." *Bagley*, 473 U.S. at 682. Indeed, "[a] robust and rigorously enforced *Brady* rule is imperative" in light of the "epidemic of *Brady* violations abroad in the land." *Olsen*, 737 F.3d at 626, 630 (Kozinski, J., dissenting). As discussed above, the core purpose of the *Brady* doctrine is to create the proper system-wide incentives for prosecutors to disclose material evidence. Unfortunately, the D.C. Court of Appeals charted the opposite course and imposed an artificially heightened materiality standard that will make *Brady* cases exceptionally difficult to win, even when—indeed, *especially* when—the evidence relates to the fundamental nature of how the crime occurred.

If allowed to stand, the decision below would dramatically skew the incentive structure created by the *Brady* doctrine, undermine prosecutorial accountability, and encourage nondisclosure in close cases. That rule is not faithful to this Court's precedents and has nothing to recommend it.

CONCLUSION

For the foregoing reasons, and those advanced by Petitioners, this Court should reverse the judgment of the D.C. Court of Appeals.

Respectfully submitted,

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RECORD AND BRIEFS

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CHARLES S. TURNER, CLIFTON E. YARBOROUGH, CHRISTOPHER D. TURNER, KELVIN D. SMITH, LEVY ROUSE, & TIMOTHY CATLETT, *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*.

RUSSELL L. OVERTON, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

ON WRITS OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF OF AMICUS CURIAE CENTER ON WRONGFUL CONVICTIONS OF YOUTH IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Petitioners' convictions must be set aside under *Brady v. Maryland*, 373 U.S. 83 (1963).

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INTERESTS OF AMICUS *CURIAE*[1]

The Center on Wrongful Convictions of Youth ("the Center") is the only organization in the country dedicated to exonerating wrongfully convicted children and to studying and pursuing evidence-based reforms that will prevent future miscarriages of justice for youth. Operating under the auspices of the Bluhm Legal Clinic at Northwestern University School of Law, the Center is a joint project of the Clinic's Center on Wrongful Convictions and the Children and Family Justice Center. Founded in 2009 by Steven A. Drizin, one of the nation's leading experts on interrogations and confessions, the Center has become nationally prominent as a result of its work in high-profile juvenile confession cases like that of Brendan Dassey, whose case was featured in the Netflix Global series Making a Murderer, and that of the West Memphis Three, whose cases have been featured in Oscar-winning documentaries like HBO's Paradise Lost and West of Memphis.

In addition to its casework, the Center regularly submits amicus briefs across the country in cases involving juvenile confessions, including a brief cited by this Court in *J.D.B. v. North Carolina*, 564 U.S. 261, 269 (2011), for the proposition that "the risk [of false confessions] is all the more troubling—and, recent studies suggest, all the more acute—when the

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[1] All parties have consented to the filing of this Brief. No counsel for a party authored this brief in whole or in part, and no person, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

subject of custodial interrogation is a juvenile." The Center's staff also regularly collaborates with law enforcement organizations, like the International Association of Chiefs of Police and leading interrogation training firm Wicklander Zulawski and Associates, to develop best practices for interrogating juvenile suspects that mitigate the risk of false confession.

INTRODUCTION AND SUMMARY OF ARGUMENT

The question presented in this case is whether the prosecution improperly withheld evidence that Catherine Fuller was not killed by Petitioners, but instead by one or two people, who were seen at the scene of the crime, including one who had a history of assaulting women and was behaving suspiciously. This evidence would have attacked the entire theory of prosecution and provided a basis to show that each and every Petitioner was innocent.

But the jury was not allowed to hear this evidence. The court of appeals held that no one would have believed that the attack was the work of one or two people, in significant part, because the government had obtained confessions from three young men who "admitted" that they and the Petitioners participated in a group attack. Pet. App. 51a-52a.[2] The D.C. Court of Appeals expressed its faith in confessions in very strong language, holding that it would require "suspending one's disbelief" to accept the "preposterous" notion that persons would

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[2] All "Pet. App." citations herein refer to the Appendix to the Petition in No. 15-1503.

confess to a crime that they did not commit. Pet. App. 57a-58a. Accordingly, "the burden on appellants to show materiality [was] quite difficult" where the exculpatory evidence ran directly counter to the statements of government witnesses, including, particularly, the confessors. Pet. App. 54a.

The assumption that only guilty people confess to crimes finds no support in this Court's precedents or in the studies that have been undertaken into the causes of wrongful convictions. As this Court has recognized, the pressures of police interrogation "can induce a frighteningly high percentage of people to confess to crimes that they never committed." *Corley v. United States*, 556 U.S. 303, 320-21 (2009). That risk is heightened when the suspect is a juvenile. *J.D.B. v. North Carolina*, 564 U.S. 261, 269 (2011)

The existence of false confessions has been proven scientifically by DNA evidence. False confessions are a leading cause of wrongful convictions of adults and children. Brandon L. Garrett, *Contaminated Confessions Revisited,* 2015 Va. L. Rev. 395, 395-7 (2015). Indeed, recent DNA exonerations are dominated by false confessions. *Id.* at 396.

In the wake of DNA exonerations, confessions cannot be regarded as sacred cows. The confessions in this case were: particularly subject to challenge as they were: obtained from vulnerable young people, through coercive interrogation tactics, inconsistent with the crime scene evidence and the other confessions, and contaminated with facts provided by the police and the media.

Because confessions are subject to challenge,

the accused is entitled to whatever exculpatory evidence the government has so they can mount the most effective challenge. Indeed, given the persuasive power of confession evidence to juries, the failure to disclose such evidence may increase the risk of wrongful conviction, making the *Brady* obligation even more imperative—not less—in confession cases.

ARGUMENT

I. FALSE CONFESSIONS, PARTICULARLY BY MINORS, ARE A SIGNIFICANT CAUSE OF WRONGFUL CONVICTIONS

1. This Court has long warned of the dangers of a criminal justice system dependent on obtaining confessions:

> We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement, which comes to depend on the "confession" will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation.

Escobedo v. Illinois, 378 U.S. 478, 488-89 (1964) (footnotes omitted); *Dickerson v. United States,* 530 U.S. 428, 435 (2000) ("Beddingsecause custodial interrogation, by its very nature, isolates and pressures the individual, we [have] stated that even without employing brutality, the 'third degree,' or

other specific stratagems, ... custodial interrogation exacts a heavy toll on individual liberty and trades on the weaknesses of individuals.").

The Court has recognized that the pressures of custodial interrogation "can induce a frighteningly high percentage of people to confess to crimes that they never committed." *Corley v. United States,* 556 U.S. at 320-21 (citing Steven A. Drizin & Richard Leo, *The Problem of False Confessions in the Post-DNA World,* 82 N.C. L. Rev. 891, 906-07 (2004)); *See also Atkins v. Virginia,* 536 U.S. 304, 320 n. 25 (2002) (noting example of intellectually disabled death row inmate, exonerated by DNA evidence, who falsely confessed to a crime that he did not commit).

Judge Kozinski of the Ninth Circuit stated in a recent article:

> Innocent people do confess and with surprising regularity. Harsh interrogation tactics, a variant of Stockholm syndrome, the desire to end the ordeal, emotional and financial exhaustion, family considerations and the youth or feeble-mindedness of the suspect can result in remarkably detailed confessions that are later shown to be utterly false.

Hon. Alex Kozinski, *Criminal Law 2.0,* 44 Geo. L. J. Ann. Rev. Crim. Proc. at vii (2015).

2. False confessions are now a well-recognized fact. DNA evidence has proved, beyond the shadow of a doubt, that innocent people do indeed

confess – often in great detail, and usually as a result of pressure-filled interrogation tactics – to crimes that they did not commit. *See* Brandon L. Garrett, *The Substance of False Confessions,* 62 STAN. L. REV. 1051, 1066-1090, 1118-19 (2010); Nat'l Reg. of Exonerations, *For 50 Years, You've Had the Right to Remain Silent,* at http://www.law.umich.edu/special/exoneration/Pages/false-confessions-.aspx (last visited Jan. 30, 2017); Steven A. Drizin & Richard Leo, *The Problem of False-Confessions in the Post-DNA World,* 82 N.C. L. REV. 891, 905-06 (2004).

Of the 349 people who have been exonerated based on DNA evidence, 28% of them had falsely confessed to the crime. *See* Innocence Project, *DNA Exonerations in the United States,* at http://www.innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited Jan. 30, 2017). Of the 1,975 proven exonerations in the National Registry of Exonerations (which include exonerations based on evidence besides DNA), 12% of them involved false confessions. *See* Nat'l Reg. of Exonerations, *% Exonerations by Contributing Factor,* at *http://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx* (last visited Jan. 30, 2017).

This is true even in the most serious cases. In a 2004 study of 125 proven false confessions, 81% of those confessions occurred in murder cases. *See* Steven A. Drizin & Richard Leo, *The Problem of False-Confessions in the Post-DNA World,* 82 N.C. L. REV. 891, 946-47 (2004). Indeed, the rate of false confessions is significantly higher in murder cases (22%) than cases involving other crimes (4-8%). *See*

Nat'l Reg. of Exonerations, *% Exonerations by Contributing Factor,* at *http://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx* (last visited Jan. 30, 2017).

Leading law enforcement organizations and interrogation trainers also recognize that false confessions can occur as a result of police interrogation tactics, particularly when those tactics are deployed against a vulnerable suspect. The leading police interrogation training firm in the country, John E. Reid & Associates – which has been an authority on police interrogations since this Court cited its training manual in the *Miranda* decision fifty years ago – devotes an entire chapter to distinguishing between true and false confessions. Fred Inbau, John Reid, et al., *Criminal Interrogation and Confessions,* (5th ed. 2013), at 340-377.

Rank-and-file officers agree; in a 2007 survey, officers estimated that 10% of all interrogations resulted in a false confession. Jessica R. Meyer & N. Dickon Reppucci, *Police Practices & Perceptions Regarding Juvenile Interrogation and Interrogative Suggestibility,* 25 BEHAV. SCI. & L. 757, 770 (2007). Indeed, the well-recognized risk of false confession has recently caused the International Association of Chiefs of Police to partner with *amicus* to create the first-in-the-nation police interrogation protocol geared at mitigating the risk of false confession when interrogating young people. *See* IACP, *Reducing Risks: An Executive's Guide to Effective Juvenile Interview and Interrogation,* at http://www.iacp.org/Portals/0/pdfs/ReducingRisksAnExecutiveGuidetoEff

ectiveJuvenileInterviewandInterrogation.pdf (last visited Jan. 30, 2017).

Similarly, it is well-accepted that multiple false confessions can happen in the same case. In one study, 30% of proven false confession cases involved, more than one defendant who falsely confessed to the same crime. Steven A. Drizin & Richard Leo, *The Problem of False-Confessions in the Post-DNA World,* 82 N.C. L. REV. 891, 972-73 (2004).

In fact, several very high-profile cases involve multiple defendants who were separately interrogated; each ended up giving a confession that appeared to be corroborated by the others' confessions; but all the defendants' confessions were later proven false by DNA. These cases include, but are not limited to:

- The Central Park Five case, in which five New York City youth falsely confessed during police interrogation to a brutal rape and beating of a female jogger, only to be exonerated years later by DNA. *See* Richard Leo, Steven A. Drizin, et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty First Century*, 2006 WISC. L. REV. 479, 480-84 (2006).

- Chicago's Dixmoor Five case, in which three Illinois youth falsely confessed during police interrogation to the rape and murder of their fourteen-year-old classmate, only to be exonerated years later by DNA. *See*

Innocence Project, *Background on Dixmoor and Englewood Cases,* at [http://www.innocenceproject.org/background-on-dixmoor-and-englewood-cases/ (last visited Jan. 30, 2017).

- The Norfolk Four case, in which four U.S. Navy sailors falsely confessed during police interrogation to the rape and murder of their fellow seaman's wife, only to be cleared years later through a combination of clemency grants and court decisions, including a federal court decision that concluded that "no sane person" would believe them guilty. *See* Innocence Project, *The Norfolk Four,* at http://www.innocenceproject.org/the-norfolk-four/ (last visited Jan. 30, 2017); Mid-Atlantic Innocence Project, *The Norfolk Four,* at https://exonerate.org/all-project-list/norfolk-four-derek-tice-danial-williams-joseph-dick-and-eric-wilson/ (last visited Jan. 30, 2017).

The interlocking nature of the confessions in these cases, it turned out, was the product of improper police practices like overly suggestive questioning and intentional or inadvertent fact-feeding by detectives – practices that are now specifically proscribed by law enforcement trainers. Brandon L. Garrett, *Contaminated Confessions Revisited,* 2015 Va. L. Rev. 395, 408-15 (2015); Fred Inbau, John Reid, et al., *Criminal Interrogation and Confessions,* at 315, 355 (5th ed. 2013).

False guilty pleas, too, are a well-documented phenomenon in proven wrongful conviction cases. In the body of DNA exoneration cases tracked by the Innocence Project, nearly 10% involved guilty pleas that were later proven false – pleas that were often entered after the defendant had confessed. *See* http://www.innocenceproject.org/innocence-project-guilty-plea-campaign (last visited on Jan. 18, 2017). False confessors are three times more likely to plead guilty than other exonerees. *See* Nat'l Reg. of Exonerations, *Guilty Pleas and False Confessions,* at *http://www.law.umich.edu/special/exoneration/Documents/NRE.Guilty.Plea.Article4.pdf* (last visited Jan. 30, 2017).

Such false guilty pleas can result from an all-too-rational decision-making process: when charged with a crime that could carry decades in prison, and when the evidence against him appears misleadingly strong (due to a false confession compounded by the failure to disclose exculpatory evidence), even an innocent rational actor could well reason that it is safer to accept a plea deal – and a shorter sentence – than to stand trial and risk the loss of lifelong freedom. Unfortunately, such false guilty pleas are often purchased at the cost of false testimony against one's co-defendants—as in the three examples cited above. For example, in the Dixmoor Five case, two of the defendants pled guilty and testified against their co-defendants in exchange for significantly reduced charges, although DNA testing decades later definitively proved the whole group innocent. *See* Innocence Project, *Background on Dixmoor and Englewood Cases,* at http://www.innocenceproject.org/

background-on-dixmoor-and-englewood-cases/ (last visited Jan. 30, 2017).

Just as the pressures of police interrogation can cause false confessions, common sense suggests that those same pressures can cause young and vulnerable witnesses to provide false information to the police—particularly where, as here, subjects were told that their failure to "cooperate" would be regarded as evidence of complicity in murder. A2198, A2200, A2282-83, A2595.

3. Despite universal agreement that false confessions and false guilty pleas exist, the District of Columbia court proceeded through its materiality analysis as though these miscarriages of justice were nothing more than figments of the imagination. Indeed, the D.C. Court of Appeals found that the exculpatory evidence was not material because "the government presented the testimony of several eyewitnesses, including two participants who admitted their own guilt, who did implicate [petitioners] in a group attack." Pet. App. 49a; *see also id.* at 51a-52a ("to think McMillan could have committed the crime himself, the jury would have to think ... that Alston and Bennett, the government's two cooperating witnesses, were innocent even though they had each pleaded guilty to homicide and continued to admit their guilt").

The D.C. Court of Appeals' faith in confession evidence is simply out-of-date in this post-DNA world. Indeed, the court got it backwards—the need for a robust *Brady* obligation is heightened in cases involving confessions. Prosecutors, in the privacy of

their offices, make the initial—and often fateful—decision of "whether tidbits that could be helpful to the defense are significant enough that a reviewing court will find it to be material, which runs contrary to the philosophy of the *Brady/Giglio* line of cases and increases the risk that highly exculpatory evidence will be suppressed." Hon. Alex Kozinski, *Criminal Law 2.0,* 44 GEO. L. J. ANN. REV. CRIM. PROC. at viii (2015). Prosecutors may believe their cases are very strong when supported by a confession and, thus, that exculpatory evidence is comparatively immaterial:

> Once a suspect confesses, police often close the investigation, deem the case solved, and overlook exculpatory information—even if the confession is internally inconsistent, contradicted by external evidence, or the product of coercive interrogation.

Saul M. Kassin, *Why Confessions Trump Innocence,* 67 AM. PSYCHOL. 431, 437 (2012).

Accordingly, in confession cases, exculpatory evidence in the prosecution's possession will often be underdeveloped and thus appear weaker than it would be after further investigation and refinement by zealous defense counsel.

Something similar happened in this case. The prosecution withheld the report of a witness who claimed to have seen a single attacker, James Blue, pull a woman into the H Street alley on the day that Ms. Fuller was killed. Pet. App. 20a. The prosecution withheld this evidence because he did not

believe the witness and he was "confident in their body of evidence pointing elsewhere." Pet. App. 21a. Thus, based on the prosecution's unilateral decision, defense counsel never had the chance to review and develop these evidentiary leads at the time of trial.

If anything, the government's *Brady* obligations are particularly crucial in cases where the defense argues that a confession is false. One of the most powerful ways of proving that a confession is false is to prove that someone else committed the crime. In many exoneration cases, confessions that were long argued to be false were only accepted as such by the courts after the defendants raised evidence that ultimately led to the identification of the real perpetrator. *See* Innocence Project, *Background on Dixmoor and Englewood Cases,* at http://www.innocenceproject.org/background-on-dixmoor-and-englewood-cases/ (last visited Jan. 30, 2017); Richard Leo, Steven A. Drizin, et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty First Century,* 2006 WISC. L. REV. 479, 480-84 (2006).

The lesson of history in the post-DNA world is that false confessions and false guilty pleas happen with "alarming regularity." *See* Hon. Alex Kozinski, *Criminal Law 2.0,* 44 GEO. L. J. ANN. REV. CRIM. PROC. at vii (2015). Judges who ignore this lesson, for example by making it "difficult" to establish that alternative perpetrator evidence is "material" in confession cases (Pet. App. 54a), run the risk of encouraging *Brady* violations and perpetuating wrongful convictions.

II. RISK FACTORS ASSOCIATED WITH FALSE CONFESSIONS ARE PRESENT IN THIS CASE

Leading psychological research, summarized in a peer-reviewed White Paper published by the American Psychological Association, has identified a number of risk factors associated with false confessions. Saul Kassin, Steven A. Drizin, et al., *Police-Induced Confessions: Risk Factors & Recommendations,* 34 LAW & HUM. BEH. 3, 16-3 (2010). There is evidence that many of those risk factors were present in this case.

A. The Confessors Were All Teenagers.

This Court has recognized that youth are at particular risk for false confessions during custodial interrogation. *J.D.B.* at 269; *see also J.D.B.,* 564 U.S. at 289 (Alito, J., dissenting) ("I do not dispute that many suspects who are under 18 will be more susceptible to police pressure than the average adult."). Children "generally are less mature and responsible than adults," *Eddings v. Oklahoma*, 455 U.S. 104, 115-16 (1982); they "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them," *Bellotti v. Baird*, 443 U.S. 622, 635 (1979); and they "are more vulnerable or susceptible to . . . outside pressures" than adults, *Roper v. Simmons*, 543 U.S. 551, 569 (2005). In the specific context of police interrUnited Statesogation, events that "would leave a man cold and unimpressed can overawe and overwhelm a" teen. *Haley v. Ohio*, 332 U.S. 596, 599 (1948).

Indeed, police interrogation trades upon a carefully calibrated system of psychological pressures designed to convince a suspect that the benefits of confessing outweigh the risks – a calculus that children are ill-equipped to make and, under the single-minded and cajoling pressure of interrogation, can too often misjudge. Richard Oshe & Richard Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action,* 74 DENV. U. L. REV. 979, 985-86 (1997).

The result is that juveniles are dramatically overrepresented in studies of proven false confessions. A study of 340 exonerations, for instance, found that individuals under the age of 18 were three times more likely to falsely confess than adults. Samuel R. Gross, et al., *Exonerations in the United States, 1989 through 2003,* 95 J. CRIM. L. & CRIMINOLOGY 523, 553 (2005); *see also* Brandon L. Garrett, *Contaminated Confessions Revisited,* 2015 VA. L. REV. 395, 400 (2015) (juveniles account for one-third of known false confessions). The International Association of Chiefs of Police, too, has recognized that "false confessions are a leading cause of wrongful convictions of youth." IACP, Reducing Risks: An Executive Guide to Effective Juvenile Interview and Interrogation (2012), p. 1, http://www.iacp.org/Portals/0/pdfs/ReducingRisksAnExecutiveGuidetoEffectiveJuvenileInterviewandInterrogation.pdf (last visited Jan. 18, 2017). It agrees that "juveniles are particularly likely to give false information—and even falsely confess—when questioned by law enforcement." *Id.*

This is a case built entirely on statements obtained from young people – secured after police interrogation. Most notably, Petitioner Yarborough was 16 when he was interrogated and eventually confessed to participating in the attack. A1178.[3] His youthful vulnerabilities, moreover, were compounded by the fact that he is intellectually disabled, another significant risk factor that is associated with false confessions. *See* Saul Kassin, Steven A. Drizin, et al., *Police-Induced Confessions: Risk Factors & Recommendations,* 34 LAW & HUM. BEH. 3, 19-21 (2010); *Atkins v. Virginia,* 536 U.S. 304, 321 n.25 (2002) (identifying intellectual disability as a risk factor for false confessions). And while *J.D.B.* and other cases have drawn a line at age 18 for purposes of *Miranda* custody rules and other pragmatic legal schemes, the psychological literature establishes that youthful vulnerabilities do not suddenly vanish upon one's eighteenth birthInday. *See* e.g. Elizabeth R. Sowell et al., *In Vivo Evidence For Post-Adolescent Brain Maturation In Frontal And Striatal Regions,* 2 NATURE NEUROSCIENCE 10 (1999) (finding that the frontal lobe does not mature until the early 20s and undergoes far more change during adolescence than any other stage of life). In a study of 125 proven false confessions, 31% of the false confessors were between the ages of 18 and 25. Steven A. Drizin & Richard Leo, the *Problem of False Confessions in the Post-DNA World,* 82 N.C. L. REV. at 945. Therefore, Alston and Bennett's relative youth – Alston was 19 when he was interrogated, and Bennett was 18 –creates a

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[3] "A" citations refer to the Appendix in the D.C. Court of Appeals.

significant risk for false confession. A1176, A1174, JX83.[4]

B. There Is Evidence that Threats of Harm and Other Coercive Tactics were Used During These Interrogations.

Despite the suspects' youthfulness, the police appear to have conducted their interrogations in an extremely aggressive fashion that evoked a risk of physical harm. The police got in the faces of these young people, screamed at them, and pounded the table when they refused to confess. Pet. App. 15a, n. 11; The police used good cop/bad cop tactics, which included the "bad cop" flying into a theatrical rage so severe that the "good cop" had to lock him out of the interrogation room before he lost all control – whereupon the "bad cop" pounded on the door in a fury and demanded to be let back in. A2539-40, A2563-64, A2469-70. In one case, the officer tore his shirt off (or pretended to do so) to exhibit his uncontainable anger when the suspect would not confess. Pet. App. 68a, A2593. The officers admitted to trying to "intimidat[e]" and "scare" Yarborough, an intellectually disabled juvenile, with these tactics. A2541, A2564. They focused on him because he was the "weakest" and "most likely to crack from pressure." A13998. The "bad cop" admitted that these tactics were designed to demonstrate to Yarborough that "*he would be better off if he told [the police] what he thought [they] wanted to hear.*" A2538 (emphasis added).

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[4] "JX" citations refer to exhibits from the post-conviction proceedings in the Superior Court.

Deployed as they were against young people alone in an interrogation room, such tactics risk implying that continued protestations of innocence could result in violence – a message that could easily result in false confessions. *See Brown v. Mississippi*, 297 U.S. 278 (1936); Saul Kassin, Steven A. Drizin, et al., *Police-Induced Confessions: Risk Factors & Recommendations*, 34 LAW & HUM. BEH. 3-38 (2010).

On top of these theatrical displays of rage, the police admitted telling Alston and Bennett that they would face harsher punishment unless they said that they were involved and fingered others. Pet. App. 15a, n.11; A2518. The officers wanted Alston and Bennett to believe that they would receive leniency if they "cooperated." A2518-20. Alston and Bennett reported that the officers threatened them with life sentences if they refused to admit their participation. Pet. App. 12a-15a; A6524-26. According to Alston, the officers said that the sentence in the case was like a pie, where he could have the whole pie (a life sentence) or a slice (a much shorter sentence). A6524-26. While the police denied threatening life sentences explicitly, they admitted using the pie analogy and it was certainly implicit that the "whole pie" in a brutal murder case would be a very long sentence indeed. A2576-77, A2566, A13958.

These types of threats and inducements present an increased risk of generating false confessions. Saul Kassin, Steven A. Drizin, et al., *Police-Induced Confessions: Risk Factors & Recommendations*, 34 LAW & HUM. BEH. 3, 12 (2010). Experience has proven that impressionable young men can believe the police assessment that a

conviction is certain (even if wrongful), and then try to make the best of a bad situation by falsely confessing. Saul Kassin, Steven A. Drizin, et al., *Police-Induced Confessions: Risk Factors & Recommendations,* 34 LAW & HUM. BEH. 3, 18-19 (2010).

C. The Confessions Were Inconsistent with the Crime Scene Evidence

1. Each of the alleged confessors described the crime in a way that was inconsistent with the crime scene evidence, as well as with the details of each other's confessions. This is a clear red flag of a false confession. In a recent study of false confession cases, the vast majority of exonerees made statements that were contradicted by crime scene evidence. Brandon L. Garrett, *The Substance of False Confessions,* 62 STAN. L. REV. 1051, 1087 (2010).

For example, knowing that the police believed that Ms. Fuller's murder was a group attack, the young men all described a frenzied assault. But the details that they provided often contradicted each other and, most importantly, the crime scene evidence. Bennett and Alston "each had made prior inconsistent statements to the police and the grand jury regarding who was present in the park and who participated in attacking Fuller." Pet. App. 6a. As to Mr. Yarborough, the decision below acknowledged: "many of the things Yarborough said on the videotape [his confession] seem unlikely when compared to the other evidence." Pet. App. 70a.

Yarborough described Ms. Fuller's blouse being torn off during the attack, but she was not wearing a blouse, she was wearing a sweater, which was intact and still on her body when it was found. A1033, A1035, A2207, A2238-39. Alston and Bennett described her being punched and kicked by multiple assailants, but her injuries were localized to one side of her body, which is inconsistent with a large group attack. A1086, A1149, A2134, A2141-45.

Alston claimed that someone hit Ms. Fuller with a 2X4 in the back of her head. A480, A1154-1156. Yarborough claimed that she was hit in the head with a stick. A1032-33, A1035. However, Ms. Fuller had no injury to the back of her head and no lacerations, soft-tissue trauma, bleeding, or other injury consistent with such a blow. A2134, A2146, A2149-50.

Bennett testified that someone punched Ms. Fuller so hard in the chin that she lost consciousness, but Ms. Fuller had no injuries consistent with such a blow—she had no injuries to her chin or jaw, no bruising on her lips, and no sign of trauma in her oral cavity. A1872, A2134, A2146-48.

Bennett "confessed" in the interrogation room that two individuals separately sodomized Ms. Fuller. A1093. However, the medical evidence showed that Ms. Fuller's was sodomized by a single thrust. A2136-37. By the time of trial, Bennett's testimony had evolved, consistent with the other witnesses, that one person sodomized her. A1093, A1117, A411.

2. Moreover, many government witnesses claimed that Ms. Fuller's legs were held down during the assault, but there were no restraint marks on her legs. A410-11, A497-98, A553-54, A1156, A2240-41.

These details seem more like an effort to placate the pre-conceived beliefs of the police than an accurate description of an event that they actually witnessed. See *Miranda v. Arizona*, 384 U.S. 436, 455 (1966) (describing tactics which pressure a suspect to "merely confirm[ ] the pre-conceived story the police seek to have him describe").

The witnesses got many other details wrong as well. Bennett stated that the attack occurred on a sunny day, when in fact it was raining. A1078, A1721. Many witnesses placed the attack in the wrong location: Alston drew a diagram that put the attack in the wrong corner of the garage and Yarborough said it happened out in the alley. A2533, A2503, A1671, A1187, A1033.

Maurice Thomas was in eighth grade when he told police he witnessed (but did not participate in) the assault. However, when he first described what he saw, he put himself in a position where he could not possibly have seen the crime. A1929, A1943-44, A1212, A1232, A1236. Only after further questioning by the police did his story evolve until he was able to testify at trial that he was finally in the only spot where a person could have seen the crime. A626-41.

These inconsistencies provide further support that these confessions and statements may have been false.

D. The Confessions Were Contaminated

One way of testing the reliability of confessions is to determine whether the confessor was able, without prompting from police, to describe crime scene details that only the real perpetrator would know. However, just like biological evidence, confessions can easily be contaminated. Contamination occurs when the police feed facts to the suspect and the suspect merely parrots back those facts, resulting in a confession that appears far more reliable than it really is. Contamination is overwhelmingly present in proven false confession cases. Brandon L. Garrett, *Contaminated Confessions Revisited,* 2015 VA. L. REV. 395, 408 (2015).

In this case, there is evidence that the confessions were heavily contaminated. The detectives admitted asking leading questions—questions that suggest the desired answer—during the interrogation. A13951. They also confronted witnesses with the substance of statements made by others, albeit while avoiding identifying the other witnesses by name. A2564-65, A2568-70, A2427, A1001, A13952-55. The predictable result was that the witnesses began to tell similar stories.

For example, Petitioner Yarborough—the intellectually disabled 16-year-old—gave his statement after hours of intentionally intimidating and coercive interrogation. A2040, A2541, A2564. The only record of his interrogation was a set of written questions and answers, which indicates that Yarborough was provided names by the detectives

whom he then said participated in the crime. A1178, 1180, A2493-2501.

Alston's confession came after hours of police interrogation, involving raised voices, slamming hands on desks, and pointing fingers. A2517. According to the detective's notes, he initially denied any knowledge. A2517, A1665-66. After he eventually agreed to acting as a lookout (A1666-69), the detectives went over a series of names with him, many of which Alston had never previously reported. A1670. Alston did not identify anyone at the scene who was not first identified by the police. A1670; A2528-2530.

There is no indication that the detectives questioned Bennett any differently, raising the risk that his confession was contaminated by facts included in leading questions. In addition, his confessions appeared to have been contaminated by news stories. In his videotaped confession, he stated that he had seen news stories of the arrests of at least some of the Petitioners. A1080. He stated that the people he had seen being arrested on the news were present when the attack started. A1080-81.[5] He testified that he thought if he repeated back what he heard in the news, the police would "leave him alone some." A2117.

Bennett states the contamination went even, further—though these details were contested by the detectives. Bennett claims that the police left their

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[5] He even described what one of the Petitioners was wearing when he was arrested. A1080.

investigation files in the interrogation room and that Bennett read these files whenever the police left so he could better accord his statement with what they wanted to hear. A2124-2125. In his videotaped confessions, there are more files on the table in front of Bennett than are seen in the confessions of Alston and Yarborough. A2917, A2914, A2916. He also claimed that Yarborough's videotaped confession was played to him, perhaps accidentally. A2125, Pet. App. 13a. All of these sources would have given Bennett the ability to tailor his statement to better match the detective's pre-conceived group attack theory.

E. The Confessions Were Too Unreliable and the Prosecution Case Too Weak to Excuse Compliance with *Brady*.

Given these risk factors, these confessions were particularly subject to challenge. The defense would have had fertile ground to argue that the confessions were untruthful, particularly when backed by strong evidence that someone else committed the crime. Indeed, even without that evidence, the jury deliberated for seven days before acquitting two defendants and deadlocking on two others. Pet. App. 10a-11a. Even the prosecutor acknowledged that the case was a close one that could have easily gone the other way. A1734, A1751.

This Court has recognized that the materiality standard is less strict where, as here, the prosecution evidence is weak. *United States v. Agurs*, 427 U.S. 97, 113 (1976). The D.C. Court of Appeals' failure to grapple with the very real possibility that the

confessions were false undermined its materiality analysis.

CONCLUSION

There is nothing special about confession evidence that makes it infallible. To the contrary, confessions and statements obtained in the course of interrogations, particularly those that present the risk factors of false confessions listed above, must be viewed not as certain guarantors of guilt, but as evidence particularly susceptible to error – and certainly susceptible to challenge by a defense attorney armed with all the information bearing on the statements' credibility. Indeed, the statements in this case bear many markers of unreliability and thus present a classic example of why the robustness of the *Brady* rule must be preserved in confession cases. The Center thus asks this Court to reverse the judgment of the District of Columbia Court of Appeals.

Respectfully submitted,

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CHARLES S. TURNER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

RUSSELL L. OVERTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI
TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR FORMER PROSECUTORS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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BRIEF FOR FORMER PROSECUTORS AS AMICI CURIAE SUPPORTING PETITIONERS

INTEREST OF AMICI CURIAE

Amici are 34 former federal and state prosecutors, including former attorneys general, who maintain an intent interest in the fair and effective administration of the criminal justice system.[1] Specifically, each of the amici supports the bedrock principle that a prosecutor's duty is to seek justice, not merely to convict. *Brady* v. *Maryland*, 373 U.S. 83, 87-88 (1963). Disclosure of all material and exculpatory evidence to the defense is fundamental to that duty. As this Court explained in *Brady*, the axiom underlying this prosecutorial responsibility is the "avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Id.* at 87 (citing *Mooney* v. *Holohan*, 294 U.S. 103 (1935)). Accordingly, this Court has long held that the "suppression

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[1] No counsel for a party authored this brief, in whole or in part, and no person other than amici or their counsel contributed any money to fund its preparation or submission. Counsel for amici provided timely notice of amici's intent to file this brief, and the parties have consented. A list of amici is appended hereto as Appendix A.

by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. The case at bar provides a textbook lesson in the importance of the *Brady* rule, especially in present times when the fairness and integrity of law enforcement's conduct and policies are under intense scrutiny and the public's confidence in the criminal justice system is threatened. Amici thus submit that it is vitally important that this Court reverse the judgment of the Court of Appeals and reaffirm *Brady* and the prosecutor's duty to adhere to its requirements without qualification or reservation.

SUMMARY OF ARGUMENT

From amici's many combined years of prosecutorial and supervisory experience, they appreciate that some *Brady* cases raise close questions. This, however, is not one of them. To the contrary, this case presents precisely the type of egregious evidence suppression that this Court has prohibited. The District of Columbia Court of Appeals' decision, which found credible eyewitness evidence of an alternative perpetrator, who had a record of similar crimes, near the crime scene to be not material under *Brady*—in an admittedly weak case—violates petitioners' right to a fair trial and undermines the public's confidence in the criminal justice system.

In 1985, the seven petitioners were convicted of the robbery, sodomy and murder of Catherine Fuller in Washington, D.C. The prosecution's theory at trial was that Mrs. Fuller had been violently attacked and murdered by a large group of young men. Petitioners' convictions rested primarily on the conflicting,

including self-contradictory, and ever-changing testimony of teenagers who suffered from substantial credibility problems. The objective physical evidence not only failed to tie any of the petitioners to the crime, but undercut the prosecution's large group attack theory. As candidly acknowledged by the lead prosecutor, the case against the petitioners—even without the substantial exculpatory evidence that was suppressed here—was "[n]ot a good one," and "easily could have gone the other way." C.A. App. A1734, A1751. In fact, the jury deliberated for seven days prior to convicting six defendants, acquitting two others, and reporting that they were deadlocked as to defendants Christopher Turner and Russell Overton. No. 15-1503 Pet. App. 10a-11a. Only after being instructed by the court to continue to deliberate, and after doing so for an additional two days, did the jury render a guilty verdict as to those two. *Id.* at 11a.

Years after the trial, it came to light that the prosecution had failed to disclose a plethora of evidence favorable to the defense, including, among many other things, six eyewitness accounts that undercut the government's large group attack theory. Prior to the trial, the prosecution had only disclosed to the defense that the street vendor who had found Mrs. Fuller's body (Mr. Freeman) had observed two men near the crime scene, and one of them "appeared to be concealing an object under his coat." Pet. App. 17a. Both men fled when the police arrived. *Ibid.* Recognizing the import of the identity of those men, the defense made a request during the trial for their identities. J.A. 62-64. But the prosecutors refused to disclose their names, notwithstanding that a known "violent criminal prone to assaulting and robbing vulnerable women in the area" where Mrs. Fuller was mur-

dered, James McMillan, had been specifically identified as being one of them. Pet. App. 32a.

Unbeknownst to the defense, the government also had amassed considerable other evidence suggesting that McMillan might have been responsible for the murder, including the statements of two *additional* witnesses who confirmed that McMillan was in the alley where Mrs. Fuller's body was found. One of those witnesses further confirmed that McMillan was acting "suspicious[ly]" and had "something under his coat." Pet. App. 17a-18a. The defense was never made aware that McMillan was a suspect, or even that he had been linked to the case in any way. Making matters worse, in addition to the evidence about McMillan, the government also withheld significant other evidence suggesting that petitioners had not committed the murder, including statements by three *other* witnesses who reported that they did not see any group of individuals in the alley around the estimated time of Mrs. Fuller's death, and evidence further impeaching the government's witnesses. *Id.* at 31a. Despite the suppression of this evidence, the lead prosecutor falsely advised the jury in his closing statement that, "[a]fter an exhaustive and intense police investigation, the only witnesses who came forward or were found, you have heard from." J.A. 239.

Notwithstanding the plain import of the suppressed evidence in this admittedly weak case, the Court of Appeals concluded that the withheld evidence in its entirety was not "material" under *Brady*. That decision represents a significant departure from *Brady* and its progeny. In *United States* v. *Agurs*, this Court expressly found that "obviously exculpatory" evidence must be disclosed under *Brady* as a matter of "elementary fairness," and that prosecutors

must be faithful to their duty that "justice shall be done." 427 U.S. 97, 107, 110-11 (1976). Indeed, amici are not aware of a single decision that has found undisclosed eyewitness identification of a plausible alternative perpetrator near the crime scene immaterial under *Brady* where there was not also substantial physical evidence linking the defendant to the crime. "[I]f the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *Id.* at 113.

Here, the Court of Appeals reasoned that the suppressed evidence could only be material if it gave "the jury a basis on which to doubt the government's *entire* case," given the evidence went to the "basic structure of how the crime occurred." Pet. App. 54a (emphasis added). Even putting aside the basic refutation that this crucial suppressed evidence went to the very heart of the government's entire case, this new standard impermissibly undermines *Brady*. The Court of Appeals expressly acknowledged that its standard made the "burden on appellants to show materiality quite difficult to overcome." *Ibid.* But this Court has consistently made clear that to prevail on a *Brady* claim, petitioners "need *not* show that they 'more likely than not' would have been acquitted had the new evidence been admitted." *Wearry* v. *Cain*, 136 S. Ct. 1002, 1006 (2016) (quoting *Smith* v. *Cain*, 565 U.S. 73, 75 (2012)). Rather, petitioners "must show only that the new evidence is sufficient to 'undermine confidence' in the verdict." *Wearry*, 136 S. Ct. at 1006. Plainly, that standard can be met here.

The Court of Appeals' circumscribed *Brady* analysis loses sight of the fundamental maxim that society only wins "when criminal trials are fair," and "our

system of the administration of justice suffers when any accused is treated unfairly." *Brady*, 373 U.S. at 87. To ensure that *Brady* protections remain a pillar of our criminal justice system, the Court of Appeals' decision should be reversed.

ARGUMENT

I. THE INTEGRITY OF THE CRIMINAL JUSTICE SYSTEM DEPENDS ON FAITHFUL ADHERENCE TO *BRADY*.

A. The Criminal Justice System Cannot Function Fairly and Effectively Unless Prosecutors Comply with *Brady*.

Because prosecutors represent "the sovereignty," they are tasked with a special obligation: to seek justice, not just convictions, even when that duty requires foregoing a conviction to protect a defendant's constitutional rights. See *United States* v. *Bagley*, 473 U.S. 667, 675 n.6 (1985). Amici have had the honor of representing both the United States of America and state government over the course of many years and different political regimes. Having acted as "servants of the law," amici personally recognize that prosecutors serve not only their client, but the rule of law and justice itself. See *Berger* v. *United States*, 295 U.S. 78, 88 (1935) (As "servant[s] of the law," prosecutors safeguard "that guilt shall not escape nor innocence suffer."); *Strickler* v. *Greene*, 527 U.S. 263, 281 (1999) (Prosecutors are not just advocates; they are servants of justice "in the search for truth in criminal trials."). Amici further appreciate that with this special obligation comes the duty to disclose exculpatory evidence to the defense. Indeed, since 1908, the American Bar Association has set standards of ethical

conduct, which have included the need for disclosure of exculpatory and mitigating evidence to criminal defendants.[2] And, over 50 years ago, this Court made clear that the obligation to turn over material, exculpatory information was a "right that the Constitution provides as part of its basic 'fair trial' guarantee." *United States* v. *Ruiz*, 536 U.S. 622, 628 (2002); see *Brady*, 373 U.S. at 87.

Underlying *Brady*'s disclosure requirement is the inherent imbalance of information that exists between prosecutors and defendants. In addition generally to having "greater financial and staff resources," the prosecution always has "inherent information-gathering advantages," including the ability to conduct an "investigation shortly after the crime has been committed when physical evidence is more likely to be found and when witnesses are more apt to remember events"; the ability to "force third persons to cooperate"; the ability "to search private areas and seize evidence" with probable cause; and access to the "vast amounts of information in government files." *Wardius* v. *Oregon*, 412 U.S. 470, 475 n.9 (1973); see also *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 813 (1987) (prosecution "has the power to employ the full machinery of the state in scrutinizing any given individual"); *United States* v. *Tavera*, 719 F.3d 705, 712 (6th Cir. 2013) (recognizing that the "superior prosecutorial investigatory appa-

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[2] In 1908, the ABA adopted the Canons of Professional Ethics, *available at* http://www.americanbar.org/content/dam/aba/migrated/cpr/mrpc/Canons_Ethics.authcheckdam.pdf. The revised and updated Canons were published as the ABA Model Code of Professional Responsibility in 1969, and as the ABA Model Rules of Professional Conduct, first released in 1983.

ratus" has "the advantage of a large staff of investigators, prosecutors and grand jurors, as well as new technology"). Given this imbalance, a prosecutor's affirmative duty of disclosure directly embodies the prosecutor's ethical duty to seek justice, not just convictions. As this Court explained in *Brady*, a prosecutor that withholds material exculpatory evidence "helps shape a trial that bears heavily on the defendant" and "casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice." 373 U.S. at 87-88.

B. The Failure to Comply with *Brady* Undermines Public Confidence in the Criminal Justice System.

In the half-century since *Brady* was decided, this Court has never wavered from its core principles. Yet, "nondisclosure of *Brady* material is still a perennial problem." *Tavera*, 719 F.3d at 708. Indeed, some believe that "*Brady* violations have reached epidemic proportions in recent years." *United States* v. *Olsen*, 737 F.3d 625, 631 (9th Cir. 2013) (denying rehearing en banc) (Kozinski, C.J., dissenting). Persistent, unchecked *Brady* violations threaten "the very integrity of the judicial system and public confidence in the system," which "depend on full disclosure of all the facts, within the framework of the rules of evidence." *United States* v. *Nixon*, 418 U.S. 683, 709 (1974). When *Brady* violations occur, they both infringe a defendant's constitutional right to due process and cast a long shadow of impropriety, and basic unfairness, over the justice system in the eyes of the public. See *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 571-72 (1980) ("To work effectively, it is important that society's criminal process satisfy the appearance

of justice . . . .") (internal citation and quotation omitted). Zealously protecting *Brady* is especially important at a time when—notwithstanding the dutiful service of most prosecutors—public confidence in the criminal justice system is declining. A recent national poll conducted by Harvard University's Institute of Politics found that nearly half of young adults lack confidence in the justice system. See Cara Tabachnick, *Poll: Young Americans Have "Little Confidence" in Justice System*, CBSNews.com (April 30, 2015); see also *Confidence in Institutions*, Gallup (June 5, 2016). Recent polls have also revealed a lack of faith in prosecutors specifically. For example, a 2013 poll conducted by the Center for Prosecutor Integrity found that 43 percent of Americans believed that prosecutorial misconduct is "widespread," while more than 70 percent believed it also goes undiscovered and unpunished. See Center for Prosecutor Integrity, *An Epidemic of Prosecutor Misconduct* (2013). Indeed, one cannot avoid frequent media coverage echoing claims of arrest and prosecution abuse by the government. Assiduous compliance with *Brady*'s strictures is both a constitutional mandate and an essential remedy to help dispel concerns about law enforcement abuse.

For these reasons, it is critical that courts not excuse *Brady* violations when they are discovered. This is not about motivation, but consequences. The recognition of *Brady* violations promotes justice in *all cases* by holding prosecutors accountable and reinforcing the importance of *Brady*'s disclosure obligations to the entire criminal justice system.

II. THIS CASE INVOLVES THE SUPPRESSION OF CREDIBLE ALTERNATIVE PERPETRATOR EVIDENCE THAT CONSTITUTES A TEXTBOOK *BRADY* VIOLATION.

Petitioners' brief (at 18-21) details the considerable amount of evidence that was suppressed by the prosecution in this case, including alternative perpetrator evidence suggesting that the prosecution wrongly identified the number and identity of the attackers. Such evidence is classic *Brady* material that should have been disclosed to the defense. The government's evidence suppression is particularly problematic because of the breadth and strength of the suppressed evidence and because the prosecution's case against petitioners was admittedly weak.

A. Alternative Perpetrator Evidence Is Quintessential *Brady* Material.

Eyewitness identification of an alternate perpetrator "is the type of exculpatory information that courts have long recognized as core *Brady* material, where the danger of a denial of due process of law is great." *Watkins* v. *Miller*, 92 F. Supp. 2d 824, 846 (S.D. Ind. 2000) (citing, *inter alia*, *United States ex rel. Meers* v. *Wilkins*, 326 F.2d 135, 138 (2d Cir. 1964) (Marshall, J.); see *Kyles* v. *Whitley*, 514 U.S. 419, 447-48 (1995) (evidence of key eyewitness's "affirmatively self-incriminating assertions"—supporting the theory of an alternative perpetrator—was material under *Brady*); accord *Williams* v. *Ryan*, 623 F.3d 1258, 1265 (9th Cir. 2010); *DiSimone* v. *Phillips*, 461 F.3d 181, 195 (2d Cir. 2006); *Mendez* v. *Artuz*, 303 F.3d 411, 415-17 (2d Cir. 2002) (per curium); *Clemmons* v. *Delo*, 124 F.3d 944, 949-52 (8th Cir. 1997); *United States* v. *Robinson*, 39 F.3d 1115, 1116-19 (10th Cir. 1994);

Cannon v. *Alabama*, 558 F.2d 1211, 1215-16 (5th Cir. 1977); *Floyd* v. *State*, 902 So.2d 775, 785-86 (Fla. 2005); *Harrington* v. *State*, 659 N.W.2d 509, 524-25 (Iowa 2003).

It is not hard to understand why. Credible evidence suggesting that someone other than the defendant committed the crime is among the most powerful evidence available to the defense. Indeed, it is difficult to imagine evidence that could be more helpful—and important to the administration of a fair trial—particularly where, as here, there is no physical evidence implicating any defendant and the alternative perpetrator was both identified by an eyewitness and had committed similar crimes. This is borne out by research, which has shown that alternative perpetrator evidence is often crucial to a defendant's ability to present a complete narrative. See Elizabeth R. Tenney et al., *Unpacking the Doubt in "Beyond a Reasonable Doubt": Plausible Alternative Stories Increase Not Guilty Verdicts*, 31 Basic & Applied Soc. Psychology 1 (2009) (the presentation of alternative perpetrator evidence increases the likelihood of acquittal); see also John H. Blume et al., *Every Juror Wants a Story: Narrative Relevance, Third Party Guilt and the Right to Present a Defense*, 44 Am. Crim. L. Rev. 1069 (2007) (narrative plays a key role in jurors' decision-making processes, and alternative perpetrator evidence is often necessary to present jurors with a "complete" narrative); Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 Cardozo L. Rev. 519 (1991) (narrative plays a key role in jurors' decision-making processes).

In addition to laying a meaningful foundation for the possibility that someone else committed the crime,

see *Kyles*, 514 U.S. at 441-42, alternative perpetrator evidence can be used to uncover leads and various defense theories, see *Banks* v. *Reynolds*, 54 F.3d 1508, 1519 (10th Cir. 1995), question the certainty of prosecution witnesses on cross-examination, see *Kyles*, 514 U.S. at 441-45, and impeach the credibility of the prosecution's witnesses by presenting contradictory evidence, see *Jamison* v. *Collins*, 100 F. Supp. 2d 647, 695 (S.D. Ohio 2000), *aff'd*, 291 F.3d 380 (6th Cir. 2002). Evidence of alternative suspects also may allow the defense to attack the "reliability of the investigation" and the State's overall theory of the case. See *Kyles*, 514 U.S. at 446; *Trammell* v. *McKune*, 485 F.3d 546, 551 (10th Cir. 2007); *Mendez* v. *Artuz*, 303 F.3d 411, 416 (2d Cir. 2002) (per curiam).

Indeed, amici are not aware of a *single* decision that has held that undisclosed witness identification of a plausible perpetrator near the crime scene was not material under *Brady* unless there was also substantial physical evidence linking the defendant to the crime. See *Beuke* v. *Houk*, 537 F.3d 618, 635-36 (6th Cir. 2008) (fingerprint and forensic evidence of the defendant in the victim's car and linking the bullets removed from victim's body to defendant's gun constituted "substantial objective evidence of [defendant's] guilt"); see also *Madrid* v. *Wilson*, 590 F. App'x 773, 779 (10th Cir. 2014); *Grube* v. *State*, 995 P.2d 794, 799 (Idaho 2000).

B. The Government Suppressed Considerable And Credible Alternative Perpetrator Evidence And Other Evidence Undermining The Prosecution's Theory Of The Case.

The government suppressed considerable and credible evidence suggesting that uncharged others

were the ones actually responsible for Mrs. Fuller's murder. As stated above, the government failed to disclose that three witnesses had specifically identified McMillan as being in the alley near the garage where Mrs. Fuller's body was found. Two of those three witnesses specifically stated that McMillan was acting suspiciously and appeared to have something hidden under his coat. Pet. App. 10a, 17a. McMillan lived a few doors away from the alley where Mrs. Fuller was murdered. In that same vicinity, he had violently assaulted and robbed two other middle-aged women just three weeks after Mrs. Fuller's murder. Pet. App. 17a.[3] The credibility of these witnesses' suppressed accounts is underscored by the fact that the prosecution itself—unbeknownst to the defense—considered McMillan a suspect in the crime. *Id.* at 17a-18a. Indeed, if the prosecution is enabled to suppress such telling evidence, it is difficult to establish any limits on what a prosecutor can justify in the future.

The prosecution also withheld from the defense at least three *other* witness statements that further undercut the prosecution's large group attack theory. See Pet. App. 31a-32a. Those three witnesses walked through the alley around the estimated time of Mrs. Fuller's death and reported that they did not see any group of individuals. As recognized by the Court of

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[3] After petitioners' trial, McMillan was convicted of a "chillingly similar" sodomy-murder that took place in 1992 in an alley just three blocks from the alley where Mrs. Fuller's body was found. See Pet. Br. 49-50. The Court of Appeals noted that this subsequent murder could not, of course, have been admitted at the trial (Pet. App. 36a-37a), but that crime further demonstrates the egregious nature of the suppression here.

Appeals, if the attack on Mrs. Fuller was occurring when those three witnesses walked through the alley, "it could not have been committed by a large group of people." *Id.* at 32a. In addition, the government failed to disclose that in the course of its investigation another witness (Ammie Davis) had identified James Blue as the individual who committed the murder. *Id.* at 19a-20a. Blue had previously been arrested for armed robbery, rape and forcible sodomy. *Id.* at 19a. The government excused its failure to provide Ms. Davis's statement because it considered her account incredible; she was unavailable at trial because Blue murdered her shortly before it began. *Id.* at 20a-22a.

C. The Government's Evidence Suppression Is Particularly Inexcusable Because the Prosecution's Case Against Petitioners Was Admittedly Weak.

In this case, there was no physical evidence linking anyone to the crime. The weapon used to commit the assault and sodomy was never located. The medical examiner could not determine from Mrs. Fuller's injuries how many persons were involved in the assault. Pet. App. 4a. After conducting more than 400 interviews and facing public pressure to find the person or persons who committed this heinous crime, the government charged 13 young men. The government's theory that a large group of young men was responsible for the crime was based on the conflicting statements of a small subset of the 400 interviews, and was contrary to the objective physical evidence. At trial, the government's case against the petitioners was admittedly attenuated (Pet. App. 5a-8a), and centered on the conflicting and ever-changing testimony of two cooperating witnesses, who were both given reduced

sentences in exchange for their testimony against the other defendants. Many years later, both of the cooperating witnesses recanted.[4]

The prosecution also offered the testimony of four other witnesses who purported to see some (but not all) of the petitioners either participate in the attack, in the alley where the crime occurred, or cross the street to rob someone. As acknowledged by the Court of Appeals, the majority of those witnesses had substantial credibility problems. The government's witnesses—who were all teenagers at the time of the trial—included:

- Carrie Eleby and Linda Jacobs, who were both "PCP users" and claimed to have observed the crime together yet gave contradictory and ever-changing accounts of both their location and the crime. Pet. App. 6a. As acknowledged by the Court of Appeals, both witnesses "were impeached or contradicted by other testimony" and had "significant credibility problems," and the jury may have "disbelieved most of [Jacobs'] testimony." *Id.* at 6a, 46a.
- Melvin Montgomery, a drug dealer who acknowledged during his testimony that he had previously denied having knowledge of the crime. See Pet. Br. 14.
- Maurice Thomas, a 14-year-old boy who, similar to the other government witnesses, gave contradictory statements over time. Thomas purported to see the crime from nearly 150 feet

[4] The District of Columbia Superior Court did not find the recantations credible. Pet. App. 110a.

away and, according to the Court of Appeals, the jury "disbelieve[d]" Thomas at least in part. See Pet. App. 7a, 47a.[5]

Based on these deficiencies, it is not surprising that the lead trial attorney for the prosecution acknowledged that the case "was not a good one" and it "easily could have gone the other way." C.A. App. A1734, A1751. In sum, there is no reasonable possibility that this error of omission was harmless.

III. THE COURT OF APPEALS' DECISION IS INCONSISTENT WITH *BRADY* AND DOES NOT PROTECT DUE PROCESS.

As this Court reiterated just last year, suppressed evidence is material under *Brady* "when there is any reasonable likelihood that it could have affected the judgment of the jury." *Wearry* v. *Cain*, 136 S. Ct. at 1006 (internal citations and quotations omitted). A defendant "need not show that he 'more likely than not' would have been acquitted had the new evidence been admitted. *Ibid.* (quoting *Smith*, 565 U.S. at 75). Rather, he must demonstrate that the suppressed evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435. In determining whether suppressed evidence is material, a reviewing court must weigh the effect of the evidence,

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[5] The prosecution also relied on a witness (Kaye Porter) who claimed to have heard one of the petitioners confess to the crime; this witness was impeached with her grand jury testimony that the defendant denied any involvement in the crime. Pet. App. 8a n.4. Notably, that witness also acknowledged having previously lied to police that one of the cooperating witnesses had confessed to the crime, because Eleby had asked her to do so, but the prosecution failed to disclose that lie to the defense. *Id.* at 22a.

individually and cumulatively, in light of the record presented at trial. See, *e.g.*, *id.* at 435 & n.10; *Bagley*, 473 U.S. at 683. Although the Court of Appeals' decision recited these legal principles, its analysis departed from them, and created an effectively insurmountable *Brady* materiality threshold for the petitioners here.

A. The Court Of Appeals Improperly Speculated About The Credibility Of The Evidence.

Rather than focusing on the potential materiality of information that identified plausible alternative perpetrators and otherwise undermined the prosecution's group attack theory, the Court of Appeals presumptively determined that the jury would nevertheless credit the testimony of the government's witnesses. In doing so, the Court of Appeals ignored this Court's instruction that courts should refrain from undertaking this type of relative *Brady* materiality analysis that "emphasize[s] reasons a juror might disregard new evidence while ignoring reasons she might not." *Wearry*, 136 S. Ct. at 1006-07; see also *Smith*, 565 U.S. at 76 (rejecting *Brady* materiality arguments that focused on what "the jury could have disbelieved" without any showing that the jury actually "would have done so"); *Brady*, 373 U.S. at 88 ("We cannot put ourselves in the place of the jury and assume what their views would have been . . . .").

It is a fundamental canon of the American legal system that credibility determinations and the weight to accord evidence are questions for the fact finder—in this case, the jury. See, *e.g.*, *Jackson* v. *Denno*, 378 U.S. 368, 386 n.13 (1964) ("[Q]uestions of credibility, whether of a witness or a confession, are for the jury."); *Florez* v. *Cent. Intelligence Agency*, 829 F.3d

178, 184 (2d Cir. 2016). In conflict with this principle, the Court of Appeals repeatedly speculated, without basis, that the jury would have discounted the suppressed evidence in this case. For example, the Court of Appeals hypothesized:

- the fact that two eyewitnesses (Jackie Watts and Willie Luchie) heard nothing else and saw no signs of activity in the alley "*more likely* indicated that the assault was over and the assailants were gone" (Pet. App. 50a) (emphasis added);
- it was "*far more likely*, in our view, that the jury would have believed that Luchie was mistaken" that both of the garage doors were closed shortly before Mr. Freeman found one of them open or believed "that someone came upon the scene and opened the garage door" (*ibid.*) (emphasis added);
- the "jury *might have* suspected that McMillan arrived on the scene only after Watts and Luchie departed (but before Freeman arrived)" (*ibid.*) (emphasis added);
- even if the jury had heard from Watts and Luchie, "*we think* the jury . . . would have had no substantial reason to suspect McMillan as the sole perpetrator" (*id.* at 51a) (emphasis added); and
- "[i]t is not implausible that McMillan heard about the attack and decided to look out of curiosity; nor that he carried something away from the garage, explaining his suspicious behavior" (*ibid.*).

This last statement demonstrates vividly how far the Court of Appeals departed from *Brady*; the test is not whether the government's case is "not implausible," but rather, whether the suppressed evidence could plausibly lead to a different view.

The Court of Appeals' approach not only deprives the criminal trial of its place "as the chosen forum for ascertaining the truth about criminal accusations," *Kyles*, 514 U.S. at 440, but signals to prosecutors that they can operate on the basis that evidence is not material for purposes of *Brady*—and therefore need not be disclosed—so long as it can be rationalized as not necessarily requiring a jury to reverse its decision. What is more, such a standard promotes a self-effectuating cycle of evidence suppression because *Brady* violations are more likely to occur where evidence conflicts with the government's theory of the case. This approach threatens to turn *Brady*'s truth-seeking function on its head.

B. The Court Of Appeals Created An Impossibly High Materiality Threshold, Effectively Applying A "Sufficiency Of The Evidence" Test.

The Court of Appeals concluded that the suppressed evidence was not material because—based on the Court of Appeals' speculation of how the jury would have viewed the evidence—it did not "directly contradict[] the government's witnesses or show them to be lying," but put at issue the "basic structure of how the crime occurred" (*i.e.*, the prosecution's theory of a group attack versus a single or few perpetrator attack). Pet. App. 53a-54a. The Court of Appeals conceded that "[t]his makes the burden on appellants to show materiality quite difficult to overcome, because it requires a reasonable probability that the

withheld evidence . . . would have led the jury to doubt *virtually everything* that the government's eyewitnesses said about the crime." *Id.* at 54a (emphasis in original). The Court of Appeals minimized the materiality of the suppressed evidence regarding McMillan on the basis that the jury could have concluded that, even if he were a perpetrator, he was part of the convicted group. *Id.* at 53a. Of course, the jury could also have concluded that he alone, or perhaps with one or two accomplices, committed the murder, particularly as his two subsequent robberies were committed alone or with one other person. See Pet. App. 18a n.12.

The *Brady* materiality standard is far from that deployed by the Court of Appeals; it "is not a sufficiency of the evidence test." *Kyles*, 514 U.S. at 434; see *ibid.* ("a showing of materiality does not require demonstration by a preponderance of the evidence that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal"). "One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 435; see also *Wearry*, 136 S. Ct. at 1006 ("Evidence qualifies as material when there is *any reasonable likelihood* it could have affected the judgment of the jury.") (citations and internal quotation marks omitted) (emphasis added); *United States* v. *Smith*, 77 F.3d 511, 515 (D.C. Cir. 1996) ("*Kyles* rightly focuses attention [ ] on the potential impact the undisclosed evidence might have had on the fairness of the proceedings. Thus, the amount of addi-

tional evidence indicating guilt is not dispositive of our inquiry.").

In *Kyles*, the Court disagreed with the dissent for doing what the Court of Appeals did here, specifically "assum[ing] that [the defendant] must lose because there would still have been adequate evidence to convict even if the favorable evidence had been disclosed." 514 U.S. at 435 n.8. The *Kyles* Court emphasized that the suppressed evidence was still material under *Brady* even if it (i) would have left two prosecution witnesses "totally untouched," (ii) would not cause the jury to doubt *all* the eyewitnesses, and (iii) was "perfectly consistent" with the government's case. *Ibid.*; see also *Trammell* v. *McKune*, 485 F.3d 546, 551 (10th Cir. 2007) (overturning district court's holding that withheld evidence was not material because it did not "cast any doubt on the eyewitness identifications" and was "consistent with [defendant's] testimony"). Significantly, the Court found that the suppressed evidence in *Kyles* was material even though—in stark contrast to the case against petitioners here—there was significant forensic evidence (including the murder weapon) that connected the defendant to the crime. *Id.* at 427-28, 445. Moreover, in this case, the suppressed evidence was totally *inconsistent* with the government's case.

C. The Suppressed Evidence Undermines Confidence In The Jury's Verdict In This Close Case.

By focusing on whether the suppressed evidence "directly contradicted" all the government's witnesses, the Court of Appeals discounted the impact that the suppressed evidence would have had on the defense's strategy, particularly when considered in the

context of the entire record. See *Kyles*, 514 U.S. at 442-49 (detailing the ways in which the defense could have attacked the prosecution's case had the prosecution not suppressed the evidence in question); *Bagley*, 473 U.S. at 683 (reviewing court should consider the "adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case.").

For example, the Court of Appeals' conclusion that the jury would have found that "McMillan simply could have been another member of that group," Pet. App. 51a, ignores that the suppressed alternative perpetrator evidence here would have been powerful new ammunition for the defense to further attack the government witnesses' testimony regarding the identity and number of individuals who participated in the attack. As otherwise acknowledged by the Court of Appeals, the testimony of the two cooperating witnesses "differed on some important matters," including whether and how certain petitioners participated in the crime, and both had made "prior inconsistent statements" to the police and grand jury on those critical issues. *Id.* at 6a. In fact, the jury discredited the testimony of both the cooperating witnesses at least in part, given its acquittal of defendant Alphonso Harris, whom both cooperating witnesses had specifically identified as having participated in the attack. See *id.* at 47a; Pet. Br. 17. The defense's alternative theory would have provided a further basis for the jury to conclude that the government's witnesses had not actually observed the petitioners participate in the crime, as they claimed. The Court of Appeals' analysis also fails to consider that the witnesses who offered the suppressed alternative perpetrator evidence—in stark contrast to the government's wit-

nesses—had no apparent motivation to testify falsely. In the end, however, these were issues for the jury to weigh, not ones for the Court itself to prejudge.

Moreover, the reviewing court should have "an awareness of the difficulty of reconstructing in a post-trial proceeding the course the defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response." *Bagley*, 473 U.S. at 683. There is no indication that the Court of Appeals had such an awareness here—even though the record reflects that not only was the defense misled, but the jury was misled given the lead prosecutor's false representation that the jury had heard from the "only witnesses who came forward or were found" during the "exhaustive and intense police investigation." Pet. Br. 45-46 (citing J.A. 239).

Considering the quality and quantity of the suppressed evidence in light of the entire record, the potential for the suppressed evidence to have affected the outcome of the trial is inescapable. The government's failure to disclose the evidence relating to McMillan—which was so credible that the government considered him a suspect—by itself is an egregious breach of the prosecution's *Brady* obligations. See *Kyles*, 514 U.S. at 441-54; *Youngblood* v. *West Virginia*, 547 U.S. 867, 870 (2006). Had McMillan's identity been disclosed to the defense, the defense would have possessed substantially more evidence to challenge the government's investigation and develop a theory that contradicted the one advanced by the prosecution. Indeed, the Court of Appeals acknowledged that the "physical (as opposed to the eyewitness) evidence of the attack adduced at trial arguably supported, or at least was not inconsistent with, a single-perpetrator theory, and there was some other evi-

dence at trial to corroborate it." Pet. App. 49a. Moreover, one of the government's own witnesses (the street vendor Mr. Freeman) would have provided further support to the theory that the crime was not committed by a large group of people, given he testified that "throughout his day . . . he never saw a large group of young people in the area." *Id.* at 49a n.79. That critical fact would have been further bolstered by the other suppressed evidence, including the statements of Willie Luchie, Ronald Murphy and Jackie Watts, who walked through the alley at the estimated time of Mrs. Fuller's death and heard groans coming from the garage, but did not observe any group. Pet. App. 50a. The withheld evidence would have given defendants a meaningful way to build on that evidence, and challenge the prosecution's large group attack theory with significant evidence.

The potential effect of the undisclosed evidence on the outcome of the trial becomes ever more readily apparent when viewed in light of the quality of the evidence presented by the government at trial. As stated by this Court, "if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *Agurs*, 427 U.S. at 113; see also *Robinson*, 39 F.3d at 1119 ("What might be considered insignificant evidence in a strong case might suffice to disturb an already questionable verdict."). Here, there was no physical evidence tying any perpetrator to the crime, which heightens the materiality of the suppressed evidence. *Castleberry* v. *Brigano*, 349 F.3d 286, 289-90 (6th Cir. 2003) (withheld evidence, including "witness accounts of suspicious persons in the vicinity" of the crime, was material where there was no physical or forensic evidence linking defendant to the crime);

Gantt v. *Roe*, 389 F.3d 908, 913 (9th Cir. 2004) (holding that newly discovered information is material when it undermines a conviction based upon little physical evidence). As stated above, the government's case rested on witnesses who had significant credibility problems. Indeed, the prosecution expressly acknowledged that the evidence against the petitioners was weak. Based on the record as a whole, it is painfully clear that the government's failure to turn over the suppressed evidence can "reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435.

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The Court of Appeals' circumscribed view of a prosecutor's duty to disclose alternative perpetrator evidence undermines *Brady* jurisprudence, and the truth-seeking process and principles of fairness on which it is based. It effectively excuses the prosecution's failure to disclose evidence in an admittedly close case even though that evidence would have resulted in a markedly weaker case for the prosecution and a markedly stronger one for the defense. It is far too easy for *Brady* violations to go unnoticed and never be discovered at all. When courts discover and acknowledge, but excuse, the suppression of exculpatory evidence of plain import to the defense, they endorse that conduct and erode the public's trust in our justice system. This is the quintessential case of evidence suppression; unless reversed, it makes *Brady* a "dead letter."

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment below.

Respectfully submitted.

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CLIFTON E. YARBOROUGH, CHRISTOPHER D. TURNER, KELVIN D. SMITH, CHARLES S. TURNER, LEVY ROUSE, & TIMOTHY CATLETT,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The District of Columbia Court Of Appeals

BRIEF OF THE INNOCENCE NETWORK AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Innocence Network is an affiliation of organizations from around the world dedicated to providing pro bono legal and investigative services to individuals seeking to prove their innocence, and working to redress the causes of wrongful convictions. The sixty-seven current members of the Network represent hundreds of prisoners with innocence claims in all fifty states, the District of Columbia, and abroad.[2]

The Innocence Network and its members are dedicated to improving the accuracy and reliability of the criminal justice system. Drawing on lessons from cases in which innocent persons were convicted, the Innocence Network advocates study and reform designed to enhance the truth-seeking functions and procedures of the criminal justice system to ensure that future wrongful convictions are prevented.

The Innocence Network frequently files amicus briefs in cases raising important issues of criminal law, including the due process protections afforded by *Brady v. Maryland*, 373 U.S. 83 (1963). *See, e.g.*, *Smith v. Cain*, No. 10-8145 (U.S. 2011). In those briefs and elsewhere, the Innocence Network has emphasized the importance of interpreting *Brady*

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1 All parties have consented to the filing of this brief. *Amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. The Mid-Atlantic Innocence Project, a member of the Innocence Network and co-counsel for a petitioner, has not made a monetary contribution intended to fund the preparation or submission of this brief.

2 The appendix lists the Innocence Network's members.

broadly in order to guarantee fair trials and secure justice.

The Innocence Network files this brief to underscore that it is especially important for the Court to reject the limitation of *Brady* reflected in the District of Columbia Court of Appeals's ruling. The Innocence Network's extensive experience with wrongful convictions and exonerations shows that evidence of an alternative perpetrator is quintessentially exculpatory and material under *Brady* in a case lacking strong physical evidence of a defendant's guilt, because access to such evidence undoubtedly is critical to guaranteeing a fair trial. In addition, a *Brady* analysis properly considers all available facts, including information materializing post-trial, when evaluating the materiality of evidence withheld pre-trial.

SUMMARY OF ARGUMENT

Petitioners were convicted of the 1984 robbery, sodomy, and murder of Mrs. Catherine Fuller in Washington, D.C. After petitioners learned years later that prosecutors had withheld exculpatory evidence in their possession pre-trial—including evidence pointing to two other suspects—petitioners sought relief under *Brady*. The court below denied post-conviction relief.

This Court should reverse the judgment of the court below and take the opportunity to instruct lower courts on the correct application of the *Brady* materiality analysis. At a minimum, *Brady* presumptively requires prosecutors to disclose alternative-perpetrator evidence, which is crucial to developing a complete defense and which has been considered material evidence since the *Brady* decision itself. *Brady* also obligates courts to consider all available information in

analyzing the materiality of undisclosed evidence, because post-conviction events often bear directly on the importance of undisclosed evidence, and neither truth nor justice will be advanced by disregarding such facts.

I. *Brady* seeks to ensure that criminal trials are just and the resulting verdicts worthy of confidence. *United States v. Bagley*, 473 U.S. 667, 675, 682 (1985); *United States v. Agurs*, 427 U.S. 97, 112 (1976). Studies—including those conducted by Innocence Network members—confirm that *Brady* violations are strongly correlated with wrongful convictions. A *Brady* violation has especially severe impact on a defendant when the withheld exculpatory material is evidence of an alternative perpetrator, as in this case. Research shows such evidence is often crucial to a defendant's ability to present a complete narrative that could influence a jury's deliberations over whether the prosecution has met its burden of proving guilt beyond a reasonable doubt. Wrongful convictions not only deprive an individual of life and liberty without justification, but also have a devastating impact on the very fabric of our civil society, which depends on continued confidence in the justice system. Accordingly, this Court should reject the lower court's limitation on what can be considered when evaluating materiality under *Brady*.

II. This Court should hold that alternative-perpetrator evidence is presumptively material under *Brady*, absent strong physical evidence of a defendant's guilt. Evidence of an alternative perpetrator is fundamental to a defendant's ability to develop challenges to whether the prosecution has proven its case. Suppression of alternative-perpetrator evidence here violated *Brady* and warrants vacating petitioners' convictions.

The D.C. Court of Appeals's interpretation of *Brady*—to permit suppression of alternative-perpetrator evidence when *no* physical evidence connects a defendant to the crime—cannot be squared with this Court's teachings. Alternative-perpetrator evidence has been at the center of the development of the *Brady* doctrine, *see Brady*, 373 U.S. at 84; *Kyles v. Whitley*, 514 U.S. 419, 432-54 (1995), and this Court has found such evidence critical to a defendant's ability to present a complete defense, *see, e.g.*, *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006). This Court should clearly state, as many lower courts have already done, that alternative-perpetrator evidence is presumptively material, at least in the absence of strong physical evidence of the defendant's guilt.

The decision below deviates from these precedents. It blessed the withholding of evidence pertaining to *two* alternative perpetrators in a case that was devoid of *any* inculpatory physical evidence, and which "easily could have gone the other way." A1751. In this instance, the withholding of that evidence rendered the trial unfair because it obviously had the potential to affect the defense's preparation and presentation of the case to the jury.

III. The court below further diverged from *Brady* and this Court's precedents by flatly refusing to consider relevant post-conviction events when assessing whether the evidence the prosecutor concededly suppressed pre-trial was material under the circumstances. The objectives of truth-seeking and fairness that animate *Brady* are served by considering *all* information that bears on the materiality of the suppressed evidence. Nothing in the *Brady* "totality of the circumstances" inquiry suggests that the materiality analysis must be limited by an arbitrary

timeframe or date cutoff. *Bagley*, 473 U.S. at 683. Thus, this Court and others have factored post-conviction information into their evaluation of *Brady* materiality.

Prosecutors in practice already consider future events—most fundamentally, how the trial might unfold—in assessing the materiality of evidence. *Agurs*, 427 U.S. at 108; *Kyles*, 514 U.S. at 438-39. *Brady*'s legal construct that prosecutors know and recognize material evidence when they see it (or when other members of law enforcement see it) is entirely consistent with assuming prosecutors know which close evidence might turn out to satisfy the *Brady* materiality standard post-trial. Nor will prosecutors face personal or professional disapprobation if it is later determined that withheld evidence is actually material—the purpose of *Brady* is not to pillory prosecutors, but to ensure the finding of guilt is as just and accurate as humanly possible. *Agurs*, 427 U.S. at 110; *see also Brady*, 373 U.S. at 87. Experience shows that reviewing courts can administer this holistic standard without difficulty, and, by considering all available information, courts may be saved from making hair-splitting judgments in close cases.

ARGUMENT

I. *BRADY* DISCLOSURES ARE FUNDAMENTAL TO A CRIMINAL TRIAL'S TRUTH-SEEKING FUNCTION AND TO THE PREVENTION OF WRONGFUL CONVICTIONS.

The job of prosecutor has traditionally attracted diligent public servants who pursue justice by following their *Brady* obligations. Nonetheless, when the government withholds exculpatory evidence, as does happen, that is a leading cause of convictions of the

innocent. The *Brady* disclosure obligation helps to promote fair trials that produce verdicts worthy of public confidence. *Brady* helps to minimize the risk that an individual's life will be forever altered by the manifest injustice of a wrongful conviction.

A. *Brady*'s Materiality Test Must Be Applied with the Objective of Promoting Fair Trials that Reach Verdicts Worthy of Confidence.

The overarching purpose of *Brady* is "to ensure that a miscarriage of justice does not occur." *Bagley*, 473 U.S. at 675. Accordingly, "[t]he proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt." *Agurs*, 427 U.S. at 112. Although "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different," the Court has underscored that "[a] 'reasonable probability' is a probability sufficient to *undermine confidence in the outcome*." *Bagley*, 473 U.S. at 682 (emphasis added). That is, faith in the integrity of the verdict—which depends on the completeness of the evidentiary record available for presentation to the jury—is the touchstone for the *Brady* rule.

The truth-and-justice-seeking function that animates *Brady* would be severely jeopardized if the Court were to narrow *Brady* as the court below did—(i) permitting courts to find *Brady* satisfied where evidence of alternative perpetrators, available prior to trial, was not disclosed despite the *absence* of strong physical evidence inculpating defendants, and (ii) preventing courts from taking into account *all* of the facts available at the time the conviction is reviewed, in-

cluding facts materializing post-trial, when determining the materiality of withheld information. This Court should reject those crabbed rules and reinforce that the *Brady* doctrine is designed to ensure the fundamental fairness of the trial.

Our adversarial system of criminal justice depends on the effective functioning of the *Brady* doctrine. Strict compliance with *Brady*'s disclosure rule helps mitigate the unavoidable information imbalance between government investigators and criminal defendants, thereby affording the accused a fair opportunity to present a complete defense to the jury. *See Brady*, 373 U.S. at 87. Moreover, a clear standard tending towards over-disclosure in close cases alleviates "the natural condition of cognitive bias" that affects a prosecutor, who—"convinced in the justice of his indictment"—"may be unable to put himself in the defense lawyer's position" and "cannot know the potential uses the defense lawyer may have for the evidence." Thomas P. Sullivan & Maurice Possley, *The Chronic Failure to Discipline Prosecutors for Misconduct: Proposals for Reform*, 105 J. CRIM. L. & CRIMINOLOGY 881, 915-16 (2015) (collecting authority).

The important upstream impact of the *Brady* rule—*viz.*, as a guiding principle for prosecutors making pre-trial decisions about what to turn over—is only amplified downstream, in the reviewing court. That is where any disclosure errors born of prosecutor bias in the strength of the state's narrative can and should be corrected. *See ibid.* Although this Court has never endorsed an "open-file policy," neither has it permitted *Brady* to devolve into a sufficiency-of-the-evidence rule; *Brady* would be stripped of its vitality if the mere existence of *some* inculpatory evidence in

the post-conviction record sufficed to overcome a *Brady* challenge. The key consideration is not, as the D.C. Court of Appeals wrongly assumed, whether the jury could have reached a guilty verdict had the evidence been disclosed to the defense. Rather, the *Brady* analysis asks whether a due-process violation occurred when the jury was allowed to deliberate without the defense's getting access to, and the right to make use of, the exculpatory evidence the government possesses.

B. The Proper Application of *Brady* Is Essential To Avoid Wrongful Convictions.

When the government withholds material, exculpatory evidence—whether knowingly or inadvertently—it denies the defendant a fair trial and risks convicting an innocent. Given the large number of prosecutions nationwide, it only takes *Brady* violations in a small proportion to infect a great many cases.

Studies by Innocence Network members have revealed an undeniable correlation between *Brady* violations and wrongful convictions. *See, e.g.*, *Government Misconduct*, INNOCENCE PROJECT OF MINNESOTA, http://ipmn.org/causes-and-remedies-of-wrongful-convictions/government-misconduct (last visited February 2, 2017) (finding *Brady* violations in 37% of 74 wrongful convictions). The Innocence Network is not alone in identifying and quantifying this alarming correlation. Another study compared wrongful convictions with "near misses"—factually-innocent indicted individuals who were acquitted or against whom charges were dropped—to determine "how the criminal justice system can and does 'get it right' when faced with an innocent defendant." Jon B. Gould et al., *Predicting Erroneous Convictions*, 99

IOWA L. REV. 471, 477, 482 (2014). The study found *Brady* violations to be statistically significant predictors of wrongful convictions, "severely harm[ing] the system's ability to self-correct from initial errors" that resulted in indictment of an innocent. *Id.* at 501. A substantial body of empirical research has reached the same conclusion.[3]

That *Brady* violations correlate to wrongful convictions is not surprising. It has long been recognized that withholding exculpatory evidence may impair the "preparation or presentation of the defendant's case." *Bagley*, 473 U.S. at 683. This information disparity is especially damaging to the defense when the undisclosed evidence relates to an alternative perpetrator. Studies analyzing juror behavior show that jurors are more likely to credit a defendant's version of events if presented with a complete and coherent narrative—

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[3] *See, e.g.*, Lissa Griffin, *Innocence and the Suppression of Exculpatory Evidence by Prosecutors*, in Controversies in Innocence Cases in America 79 (Sarah Lucy Cooper ed. 2014) (noting that the second-most "frequent basis for wrongful convictions has been prosecutorial suppression of exculpatory evidence"); N.Y.S. BAR ASS'N, Task Force on Wrongful Convictions, Final Report of the N.Y. State Bar Association's Task Force on Wrongful Convictions 19, 24-26 (2009) (identifying *Brady* violations as among the causes of over 50% of fifty-three wrongful convictions and compiling examples of violations); Bennett L. Gershman, *Reflections on* Brady v. Maryland, 47 S. TEX. L. REV. 685, 686 & n.8 (2006) (cataloging sources finding that "hundreds of convictions have been reversed because of the prosecutor's suppression of exculpatory evidence"); Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399, 403 n.20, 425 n.134 (2006) (citing studies linking *Brady* violations to wrongful convictions); James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839, 1850, 1864 n.79 (2000) (finding *Brady* violations were one of "the two most common errors" leading to reversals of death sentences).

including, in particular, evidence of who other than the defendant may have committed the crime—to counter the narrative presented by the prosecution. *See* John H. Blume et al., *Every Juror Wants a Story: Narrative Relevance, Third Party Guilt, and the Right to Present a Defense*, 44 AM. CRIM. L. REV. 1069, 1087-91 (2007). "Jury research has long established that jurors tend to base decisions on the presentation of a persuasive story, the strength of which is judged in part on the completeness of key story elements." David S. Schwartz & Chelsey B. Metcalf, *Disfavored Treatment of Third-Party Guilt Evidence*, 2016 WIS. L. REV. 337, 341 (2016) (highlighting the value of alternative-perpetrator evidence).

Brady violations upend lives. A few examples of *Brady*'s power illustrate the risks of limiting the doctrine.

- Michael Morton served over twenty-four years in prison for murdering his wife before being exonerated. At his trial, prosecutors withheld critical exculpatory evidence, including his son's eyewitness account of the crime, his neighbors' statements that on the day of the crime another man had parked behind the Mortons' home and walked into the woods nearby, and that someone in another city attempted to use Mrs. Morton's credit card after her murder. The withheld evidence pointed to a man who, after Mr. Morton's conviction, committed another murder very similar to Mrs. Morton's. *Michael Morton*, INNOCENCE PROJECT, http://www.innocenceproject.org/cases/michael-morton (last visited February 2, 2017).
- Jerry Watkins served thirteen years for abducting, raping, and murdering an eleven-year-old girl before being exonerated. He was convicted although

no physical evidence connected him to the crime. After trial, he learned that prosecutors had investigated other suspects and had withheld an eyewitness's account of the abduction that pointed to a different suspect. *Jerry Watkins*, INNOCENCE PROJECT, http://www.innocenceproject.org/cases/jerry-watkins (last visited February 2, 2017).

- Dwayne Provience served eight years in prison for murder before he was able to prove his innocence. The prosecution failed to disclose a note from police files indicating that an alternative perpetrator might have committed the crime. The note showed that—one month after the murder for which Provience was convicted—another murder occurred in the neighborhood, with the apparent motive of preventing the second victim from offering evidence exculpating Provience and inculpating the alternative perpetrator. *Provience v. City of Detroit*, 529 F. App'x 661, 666-67 (6th Cir. 2013) (denying qualified immunity and finding that the note was "clearly material exculpatory evidence").

These are but three illustrations of where actually innocent defendants were convicted after the prosecutor withheld exculpatory alternative-perpetrator evidence. The consequences of years unjustly spent in prison can never be erased, nor can the harm of a wrongful conviction ever truly be corrected. Adrian T. Grounds, *Understanding the Effects of Wrongful Imprisonment*, 32 CRIME & JUST. 1, 1-3 (2005).

Moreover, faith in our justice system is critical to a just and ordered civil society. Yet wrongful convictions erode that confidence. In one study, 75% of those surveyed believed wrongful convictions occur occasionally or frequently, and 57% responded that wrongful convictions happen frequently enough to justify

major changes in how criminal suspects are prosecuted. *See, e.g.*, Marvin Zalman et al., *Citizens' Attitudes Toward Wrongful Convictions*, 37 CRIM. JUST. R. 51, 57, 60 (2012). Holding that *Brady*'s materiality standard recognizes the special power of alternative-perpetrator evidence will foster confidence that the criminal justice system is fundamentally concerned with seeking truth, and engender "trust in the prosecutor as the representative of a sovereignty whose interest in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Kyles*, 514 U.S. at 439 (internal quotations and alterations omitted).

II. INFORMATION ABOUT ALTERNATIVE PERPETRATORS IS CLASSIC EXCULPATORY EVIDENCE THAT IS MATERIAL ABSENT STRONG INCULPATORY PHYSICAL EVIDENCE.

Suppression of exculpatory information rises to the level of materiality under *Brady* when "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435. In *Kyles*, as in *Brady* itself, this Court found that materiality standard satisfied when the government failed to disclose evidence relating to an alternative perpetrator.

The Court should take this opportunity to provide guidance that alternative-perpetrator evidence is presumptively material under *Brady*, at least where there is not strong physical evidence of a defendant's guilt. That rule would be consistent with this Court's cases holding that evidence relating to an alternative perpetrator is so often "critical" to a defendant's constitutional right to put on a defense that it may justify displacing state-law procedural rules limiting its admissibility. *See, e.g., Chambers v. Mississippi*, 410 U.S. 284 (1973). It would also comport with the pro-

disclosure approach followed by the many federal and state courts that have interpreted *Brady* to require disclosure of evidence of a plausible alternative perpetrator when the government lacks strong physical evidence inculpating a defendant.

In this case, concededly exculpatory evidence relating to two plausible alternative perpetrators was suppressed by the government *before the trial*. The prosecution knew that James McMillan was present at the scene of the crime (multiple witnesses confirmed it), had an object hidden under his coat (the object used to sodomize Mrs. Fuller was never found), was "acting suspiciously," and fled when police arrived. Pet'rs. Br. 19-20. The prosecution also was aware not only that McMillan lived in the neighborhood in which Mrs. Fuller was murdered, but that—mere weeks after Mrs. Fuller's murder, and before petitioners' trial—McMillan had violently assaulted and robbed two other middle-aged women in the neighborhood, crimes for which he was convicted and served time. *Ibid.* Unsurprisingly, McMillan was investigated as a suspect in the murder of Mrs. Fuller, and may have been interviewed by the lead prosecutor on the case. *Ibid.* Yet McMillan's identity, the witnesses confirming his suspicious behavior, and his series of attacks on women in the neighborhood were withheld from the defense.

Significant evidence about James Blue was also suppressed. Just three weeks after Mrs. Fuller's homicide, a witness told investigators that on the day of that murder James Blue had pulled a woman into an alley and beaten and killed her—but the government (inexplicably) never followed up on that statement. *Id.* at 18. Blue, who had previously committed crimes with similar characteristics, was released from prison

the very day Mrs. Fuller was killed. Shortly before petitioners' trial, Blue murdered the individual who had implicated him in the Fuller murder. Yet the prosecution apparently never breathed a word to the defense about Blue. *Ibid.*

This alternative-perpetrator evidence was not disclosed even though the prosecutors knew that the case record was devoid of inculpatory physical evidence or any other reliable indicia of petitioners' guilt, and replete with physical evidence incompatible with the government's group-attack theory of the crime. This Court should find that the withholding of alternative-perpetrator evidence here violated *Brady*; petitioners' convictions should be vacated.

A. This Court Has Long Recognized that Evidence of an Alternative Perpetrator is Critical Exculpatory Evidence Necessary To Present A Complete Defense.

Evidence of alternative perpetrators has been of central importance to this Court's development of both the *Brady* doctrine and the right of a criminal defendant to present a complete defense and receive a fair trial.

Withheld alternative-perpetrator evidence was at issue in the very case that established the *Brady* doctrine. In *Brady v. Maryland*, Brady claimed that prosecutors had improperly suppressed admissions by Boblit, his companion, of having committed the actual killing. 373 U.S. at 84. This Court agreed, holding that suppression of such alternative-perpetrator evidence—no less than using perjured or false evidence—can render both the guilt and sentencing phase of a trial "unfair ... to the accused," in contravention of constitutional due process. *Id.* at 87.

More recently, in an opinion canvassing decades of *Brady* jurisprudence and establishing the leading framework for analyzing *Brady* claims, this Court again recognized the exculpatory force of alternative-perpetrator evidence. In *Kyles v. Whitley*, this Court held that the prosecution's withholding of evidence, including evidence pointing to Beanie, an alternative perpetrator, violated due process. *See* 514 U.S. at 432-41, 445-49, 453-54. The Court hypothesized that if evidence that Beanie had framed Kyles for the murder had been disclosed, the defense might have benefitted in at least three ways: presenting the evidence at trial "would have allowed the jury to infer that Beanie was anxious to see Kyles arrested"; Kyles would have been able to "attack[] the reliability of the investigation in failing even to consider Beanie's possible guilt"; and the evidence would have "magnified the effect on the jury of explaining how" Beanie knew to direct police to the location where incriminating physical evidence "happened to be recovered." *Id.* at 429, 445-47. The existence of other "inconclusive[]" physical evidence against the petitioner made no difference, because it would "hardly have amounted to overwhelming proof that Kyles was the murderer," a level of proof the prosecution bore the burden of establishing. *Id.* at 451, 453. The withheld evidence, including the alternative-perpetrator evidence, undermined confidence in the verdict.

Thus, from the inception of the *Brady* rule through the doctrine's evolution, this Court has recognized that alternative-perpetrator evidence is of paramount value to mounting an effective defense and lies at the heart of the prosecution's disclosure obligations under *Brady*. A defendant may use such evidence to uncover other witnesses and leads, to point

the jury towards the possibility of another's culpability, or even to call into question the reliability and thoroughness of the state's investigation. *See id.* at 429, 446-47. When such evidence is withheld, the state's "case [is] much stronger, and the defense case much weaker, than the full facts would have suggested." *Id.* at 429.

Outside of the *Brady* context too, this Court has recognized that a criminal defendant's right to a "'meaningful opportunity to present a complete defense'" often depends upon alternative-perpetrator evidence. *Holmes*, 547 U.S. at 324 (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)). In defining that constitutional right, this Court has described alternative-perpetrator evidence as "relevant and material," and deemed such evidence so important that barring its admission at trial violates a defendant's right to "present [his] version of the facts" to the jury. *Washington v. Texas*, 388 U.S. 14, 19, 23 (1967). Thus, evidentiary rules mandating the exclusion of "critical evidence" of third-party guilt deny the defendant "a trial in accord with ... fundamental standards of due process" and "defeat the ends of justice." *Chambers*, 410 U.S. at 302; *see also Green v. Georgia*, 442 U.S. 95, 97 (1979) (per curiam) (characterizing alternative-perpetrator evidence as "highly relevant," and holding that its exclusion, under state hearsay rules, "constituted a violation of the Due Process Clause").

These cases led this Court most recently to the conclusion that a trial court cannot constitutionally exclude alternative-perpetrator evidence based on its pre-trial belief that "there is strong evidence of ... guilt." *See Holmes*, 547 U.S. at 324-26, 328-31. As the Court explained, "[j]ust because the prosecution's evidence, *if credited*, would provide strong support for a

guilty verdict, it does not follow that evidence of third-party guilt" may be excluded; "the strength of the prosecution's case cannot be assessed without making the sort of factual findings that have traditionally been reserved for the trier of fact." *Id.* at 330-31.

The *Holmes* line of cases is complementary authority that supports treating alternative-perpetrator evidence as presumptively material (absent strong inculpatory physical evidence). Under this Court's precedents, the fundamental right to present a complete defense is impaired—in violation of *Brady*—if evidence of alternative perpetrators is withheld in advance of trial.

B. Alternative-Perpetrator Evidence Is Presumptively Material Under *Brady* Where Strong Inculpatory Physical Evidence Is Lacking.

Consistent with this Court's view, the federal courts of appeals and state high courts have long understood that alternative-perpetrator evidence is material under *Brady* in cases where physical evidence of the defendant's guilt is infirm.

Applying this Court's precedents in a case where "[n]o physical evidence tied" the defendant to the crime, the *en banc* Ninth Circuit held that "[w]ithholding knowledge of a second suspect conflicts with the Supreme Court's directive that 'the criminal trial, as distinct from the prosecutor's private deliberations, be preserved as the chosen forum for ascertaining the truth about criminal accusations.'" *United States v. Jernigan*, 492 F.3d 1050, 1056-57 (9th Cir. 2007) (en banc) (quoting *Kyles*, 514 U.S. at 440). Shortly thereafter, a panel of the Ninth Circuit—also in a case with "little physical evidence connecting" the defendant to

the crime—"recognized the principle that the government may not, consistent with *Brady*, suppress information that another person committed the crime for which the defendant is on trial." *Williams v. Ryan*, 623 F.3d 1258, 1266 (9th Cir. 2010).

In reaching that categorical conclusion, the *Williams* court noted that "evidence suggesting an alternate perpetrator is classic *Brady* material." *Id.* at 1265 (quotation marks omitted). Such information concerning a possible alternative suspect has the power to fundamentally change "the preparation or presentation of the defendant's case," *Bagley*, 473 U.S. at 683; if "disclosed to the defense," it would allow the defendant to contact other witnesses, highlight "inconsisten[cies] with the State's theory at trial," and also "point to an alternative suspect who may himself have been responsible for the brutal crime," *Williams*, 623 F.3d at 1265-66. Indeed, the disclosure rule regarding alternative-perpetrator evidence was, in the Ninth Circuit's view, so clearly established decades ago that "[a]ny reasonable police officer in 1984 would have understood that evidence potentially inculpating another person fell within *Brady*'s scope." *Carillo v. Cnty. of Los Angeles*, 798 F.3d 1210, 1226 (9th Cir. 2015), *cert. denied*, *Ditsch v. Carillo*, 136 S. Ct. 1671 (2016).

The Sixth Circuit has used similarly categorical language in holding that suppressing evidence of a "legitimate" alternative perpetrator violates *Brady* when the state's case lacks physical evidence. In companion cases where "[t]he state never discovered any physical evidence linking" either defendant to the crime, that court explained that "[o]n its face, the nondisclosure of the identities" of alternative perpetrators works "an egregious breach of the state's *Brady* obligations."

Gumm v. Mitchell, 775 F.3d 345, 364, 371 (6th Cir. 2014); *Bies v. Sheldon*, 775 F.3d 386, 400-01 (6th Cir. 2014). Although prosecutors are not "necessarily required to disclose every stray lead and anonymous tip," they "*must disclose* the existence of 'legitimate suspect[s]'...." *Gumm*, 775 F.3d at 364 (citations omitted, emphasis added); *Bies*, 775 F.3d at 400. Endorsing the Ninth Circuit's view that "[w]ithholding knowledge of a second suspect" cannot be squared with *Brady*, the court readily concluded that "the state's failure to turn over ... evidence implicating other individuals in the murder and calling into question the state's own account of the crime can 'reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Gumm*, 775 F.3d at 364, 373 (quoting *Kyles*, 514 U.S. at 435); *Bies*, 775 F.3d at 400, 403.

Other circuits have reached analogous conclusions. The Tenth Circuit, for example, has found alternative-perpetrator evidence material under *Brady* where prosecutors lack physical evidence of guilt, because such evidence "creates reasonable doubt" that the defendant committed the crime, and "in the hands of the defense, it could [be] used to uncover other leads and defense theories and to discredit the police investigation." *Bowen*, 799 F.2d at 612-13; *see also Banks v. Reynolds*, 54 F.3d 1508, 1517-18, 1521 (10th Cir. 1995); *Miller v. Angliker*, 848 F.2d 1312, 1314-15, 1322-23 (2d Cir. 1988). The Eighth Circuit has held that undisclosed alternative-perpetrator evidence was material even where the prosecution's case was strong. *Clemmons v. Delo*, 124 F.3d 944, 947, 951 (8th Cir. 1997). No federal court of appeals has held that alternative-perpetrator evidence is categorically immaterial in the absence of strong physical evidence of a defendant's guilt.

So, too, state high courts have held that withholding alternative-perpetrator evidence violates *Brady* in cases where strong physical evidence of the defendant's guilt is absent. These courts, like their federal counterparts, have explained that alternative-perpetrator evidence is "bedrock *Brady* material[]" which, if suppressed, justifies "'ordering new trials'" in cases where "physical evidence against the defendant is not as strong." *Floyd v. State*, 902 So.2d 775, 783-87 (Fla. 2005) (quotation marks omitted); *see also, e.g.*, *People v. Beaman*, 890 N.E.2d 500, 511-14 (Ill. 2008) (failing to disclose alternative-perpetrator evidence material where "tenuous" and "circumstantial" evidence against defendant was not "particularly strong evidence of his guilt"); *Harrington v. State*, 659 N.W.2d 509, 515, 524-25 (Iowa 2003) (concluding that alternative-suspect evidence would have been "the centerpiece of a consistent theme that the State was prosecuting the wrong person" where "physical evidence linking Harrington to the crime was minimal").

The approach taken by federal and state appellate courts reveals a consistent theme: suppression of alternative-perpetrator evidence is excused only in the narrow category of cases where there is either strong physical evidence of the defendant's guilt, or only minimal evidence pointing to a third party. *See, e.g.*, *Canales v. Stephens*, 765 F.3d 551, 575-76 (5th Cir. 2014) (finding suppression immaterial when defendant's "confessional letter describing the murder step-by-step" made other suspect "not a particularly plausible one"); *Smith v. Holtz*, 210 F.3d 186, 196, 198-99 (3d Cir. 2000) (noting "physical evidence ... inexorably tied" defendant to the crime); *Grube v. State*, 995 P.2d 794, 799 (Idaho 2000) (highlighting physical evidence inculpating defendant). In other words, those courts have adopted (nothing more than) the common-sense

exception that, although "*Brady* requires the prosecution to produce evidence that someone else may have committed the crime," it need not produce evidence where "the 'other suspects' ... were ephemeral." *Jarrell v. Balkcom*, 735 F.2d 1242, 1258 (11th Cir. 1984).

Petitioners' case does not come close to falling within that exception.

C. The D.C. Court of Appeals's Interpretation and Application of *Brady* Violated Petitioners' Right To A Fair Trial, Rendering Their Guilty Verdicts Unworthy of Confidence.

This Court's cases, together with the circuit and state courts' application of those rulings, make two things clear. First, information about alternative perpetrators is material exculpatory evidence that must presumptively be disclosed unless there is strong physical evidence of a defendant's guilt. Second, the reason such alternative-perpetrator evidence is so indispensable is that confidence in a guilty verdict cannot be assured if the jury never had a chance to observe what defense counsel could have done with such information. Simply put, the disclosure of alternative-perpetrator information is likely to fundamentally change the course of a case, and justice suffers if such evidence is considered not material.

Had the D.C. Court of Appeals correctly applied those principles, it would have found that suppressed evidence implicating James McMillan and James Blue was material under *Brady*. McMillan was identified by multiple witnesses as fleeing the crime scene with something hidden under his coat, and had robbed and assaulted two other middle-aged women near the crime scene just weeks after Mrs. Fuller's murder.

Blue slaughtered a witness who told police that he had murdered a woman in an alley the day of Mrs. Fuller's homicide, a statement the prosecution never followed up on (let alone disclosed). Nonetheless, absent the evidence connecting those suspects to the crime scene, petitioners were unable to question the rigor of the government investigation or to present the jury with a counter-narrative in the form of an alternative-perpetrator theory to explain not only (i) why prosecutors lacked solid physical evidence of their guilt, but also (ii) why the only physical evidence prosecutors *did* have flatly contradicted the state's group-attack theory of the crime.

In these circumstances, the "exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and survive the crucible of meaningful adversarial testing." *Crane*, 476 U.S. at 690-91 (quotation marks omitted). Indeed, it is fanciful to say with confidence that the case would have unfolded the same way if the government had complied with its *Brady* obligations. "Even if the jury—armed with all of this new evidence—could have voted to convict [petitioners]," this Court should "have 'no confidence that it *would* have done so.'" *Wearry v. Cain*, 136 S.Ct. 1002, 1007 (2016) (per curiam) (citation omitted). The *Brady* inquiry manifestly "does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." *Kyles*, 514 U.S. at 434.

This Court should, therefore, reverse the decision below based on the clear, administrable rule the lower courts have extrapolated from its *Brady* cases: alternative-perpetrator evidence is material under *Brady* absent strong physical evidence of a defendant's guilt.

Making that common-sense rule explicit would minimize the burden on prosecutors and judges by providing well-defined guidance in an area of law that has long been fraught with difficult judgment calls. *See, e.g.*, *Kyles*, 514 U.S. at 439-40. In particular, a rule of presumptive disclosure could help to resolve the tension inherent in a prosecutor's assessing the weaknesses of the state's case. Such a rule would enhance confidence in verdicts in two important ways. First, it would leave to defense counsel, not to the "prosecutor's private deliberations," the evaluation of how to use evidence pointing to alternative perpetrators. *Id.* at 440. Second, it would enable defendants to present a case that the jury is most likely to credit—a complete and coherent narrative that includes evidence of who other than the defendant might have committed the crime. *See* Blume, *supra*, at 1087-91; *see also*, *e.g.*, *Gumm*, 775 F.3d at 370-71 (noting disclosure of alternative-perpetrator evidence "would have provided a compelling counter-narrative to the state's theory of the case"); *Harrington*, 659 N.W.2d at 524-25 (finding it "more probable that the jury would have disregarded or at least doubted" testimony by a supposed accomplice "had there been a true alternative suspect"). "The defendant's ability to tell the right story—and to tell it completely"—is not only "a powerful influence on the outcome of a trial," but "central to the protection of his constitutional right to present a complete defense." Blume, *supra*, at 1091.

Holding that alternative-perpetrator evidence is material absent strong physical evidence of guilt also furthers the policy concerns undergirding the *Brady* doctrine and the sanctity of the fair-trial right that the rule is designed to protect. Where evidence is allowed to be withheld in such circumstances, it harms the integrity of guilty verdicts and undermines faith in

criminal convictions nationwide.

III. COURTS SHOULD CONSIDER ALL AVAILABLE INFORMATION WHEN EVALUATING *BRADY* MATERIALITY.

In 1992, after petitioners' convictions, McMillan assaulted, sodomized, and murdered another woman in an alley just three blocks from where Mrs. Fuller was found. Pet'rs. Br. 20. This crime was strikingly similar to the brutal murder of Mrs. Fuller. An expert testified at petitioners' post-conviction hearing that sexual assaults with these characteristics are rare—which raises the obvious question whether McMillan, acting alone, committed both heinous murders. *Id.* at 23.

In deciding petitioners' *Brady* claim, however, the D.C. Court of Appeals refused to consider McMillan's 1992 crime. Instead, it announced a *per se* rule that information that post-dates a defendant's conviction is "not relevant to whether the government violated its *Brady* obligations" to a defendant and has "no bearing on the question of the materiality of any evidence that the government actually did withhold from the defense." App. to Pet. for Cert. 36a.

The *Brady* error here was manifest based on the evidence withheld before trial, even absent any consideration of post-conviction information. Nonetheless, under this Court's precedents, McMillan's 1992 crime bears on, and confirms, the materiality of evidence withheld from the petitioners, and should have been considered as part of the "totality of the circumstances" test for determining whether *Brady* was violated. *See Agurs*, 427 U.S. at 112; *Kyles*, 514 U.S. at

434, 440. When analyzing materiality properly, consideration of available post-conviction information is consistent with the animating principles of *Brady*.

A. This Court Has Permitted the Consideration of Post-Trial Events In Determining Whether *Brady* Was Violated.

This Court has considered post-trial events that shed light on the materiality of undisclosed evidence. In *Wood v. Bartholomew*, this Court described post-trial events as the "best possible proof" of whether suppressed evidence was material under *Brady*, and summarily reversed because the circuit court had "disregarded" post-conviction testimony in its *Brady* analysis. 516 U.S. 1, 7-8 (1995). That post-conviction evidence, adduced years after the trial, consisted of testimony from counsel about how the undisclosed evidence might have impacted the trial. *Id.* Similarly, in *Kyles*, this Court found that post-conviction information, including the testimony of the prosecutor and the detective at petitioner's post-conviction hearing, "confirmed" the materiality of undisclosed evidence. 514 U.S. at 448. The post-conviction testimony called into question the integrity of the investigation, and suggested that an alternative perpetrator may have framed the defendant.

Consistent with *Wood* and *Kyles*, this Court should endorse the proposition that courts may consider post-conviction information for any purpose bearing on the materiality of withheld evidence. *Brady* always envisioned the materiality analysis as a holistic inquiry, without arbitrary or fixed limits on what could be evaluated. The reviewing court must assess the possibility of "any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case"

and whether "such effect might have occurred in light of the *totality of the circumstances*." *Bagley*, 473 U.S. at 683 (emphasis added). To that end, this Court has time and again reaffirmed the core principle that *Brady* materiality is a fact-intensive analysis that should take all available evidence into account. *See id.*; *Wood*, 516 U.S. at 7-8; *Kyles*, 514 U.S. at 434, 441 (evidence must be evaluated "cumulative[ly]"); *Wearry*, 136 S.Ct. at 1007 (finding error in considering materiality of evidence "in isolation rather than cumulatively").

No part of the *Brady* doctrine incorporates a rigid time limit on what can be considered in the materiality analysis. *Brady* seeks to "preserve the criminal trial ... as the chosen forum for ascertaining the truth about criminal accusations" and to ensure the "justice of the finding of guilt." *Kyles*, 514 U.S. at 440; *Agurs*, 427 U.S. at 112. There is nothing to be gained in evaluating the "truth about criminal accusations" or the "justice of the finding of guilt" if the post-conviction court shuts its eyes to events that bear directly on the materiality of undisclosed evidence based solely on a time limitation. In nfact, consideration of how post-trial information might bear on the significance of suppressed pre-trial facts actually *enhances* the truth-seeking function of a criminal trial. Either the information, considered with the whole case record, will reinforce that the trial was fair, or it will justify vacating a verdict that is unworthy of confidence.

Finally, there is "a significant practical difference between the pretrial decision of the prosecutor and the post-trial decision of the judge." *Agurs*, 427 U.S. at 108. The prosecutor must assess materiality pre-trial, with necessarily incomplete information about how the trial might unfold and with a necessarily skewed

outlook given his sponsorship of the indictment. *Agurs*, 427 U.S. at 108; *Kyles*, 514 U.S. at 438-39. The post-conviction court, on the other hand, has the benefit of a full trial and post-conviction record, including any directly relevant information that materializes years after the trial. *See Wood*, 516 U.S. at 7-8; *Kyles*, 514 U.S. at 448. In reversing the D.C. Court of Appeals's erroneous decision to the contrary, this Court should endorse the consideration of post-trial events in a *Brady* analysis, and encourage courts to weigh all available information when adjudicating materiality.

B. Circuit Courts and State Courts Use Post-Conviction Events In Determining Whether *Brady* Was Violated.

Following this Court's precedents, multiple federal circuit courts have factored post-conviction information into their evaluation of *Brady* materiality. For example, the Ninth Circuit analyzed two declarations, executed years after the conviction, to determine the materiality of undisclosed evidence of an alternative perpetrator. *Williams*, 623 F.3d at 1265. In the court's view, the post-conviction information *confirmed* that those witnesses could in fact inculpate a third party and exculpate the petitioner. *Id.* at 1262-63, 67-68. Likewise, the Second Circuit considered post-conviction affidavits of eyewitnesses—who recanted their testimony after seeing suppressed evidence—and found that it was "likely that [the undisclosed evidence] would have had seismic impact," in part because it would have "furnished the defense with promising lines of inquiry." *Leka v. Portuondo*, 257 F.3d 89, 97, 106 (2d Cir. 2001). The Tenth Circuit has also looked to post-conviction testimony of trial counsel as a useful indicator of the materiality of the withheld evidence. *Banks*, 54 F.3d at 1520.

The Missouri and Iowa Supreme Courts have similarly considered post-conviction events to help gauge the materiality of undisclosed evidence. Relying on *Kyles*, the Missouri high court has specifically instructed courts reviewing "an alleged *Brady* violation" to "consider[] *all available evidence uncovered following the trial.*" *State ex rel. Griffin v. Denney*, 347 S.W.3d 73, 77-79 (Mo. 2001) (emphasis added) (citing *Kyles*, 514 U.S. at 448); *see also Woodworth v. Denney*, 396 S.W.3d 330, 338 (Mo. 2013). Applying that principle, the court found suppression of evidence that an alternative perpetrator possessed a weapon at the time of the crime material in light of a post-conviction confession implicating the alternative perpetrator. *Griffin*, 347 S.W.3d at 77-79. The Iowa Supreme Court considered a police officer's post-trial testimony that an alternative perpetrator was "the prime suspect" in an investigation as indicating the importance of withheld police reports chronicling the investigation and the likelihood that the defense strategy would have been different had those reports been disclosed. *Harrington*, 659 N.W.2d at 524.

Numerous federal circuit courts and state high courts have found post-conviction events useful for the difficult task of "reconstructing in a post-trial proceeding the course that the defense and the trial would have taken," had suppressed evidence been disclosed. *Bagley*, 473 U.S. at 683. The D.C. Court of Appeals stands alone in categorically barring consideration of such information. That aberrant decision should be reversed.

C. Considering Post-Conviction Events In Determining Whether *Brady* Was Violated Is Workable For Prosecutors And Administrable For Courts.

Allowing courts to consider post-conviction events in determining materiality will advance the goals of *Brady*, without creating difficulties in practice. Prosecutors will carry on just as they do today, striving to assess the materiality of evidence using incomplete information, but with a stronger incentive to err on the side of over-disclosure. Courts will carry on as many already do, using post-conviction events that shed new light on undisclosed evidence to assist in *Brady* materiality analyses.

The Constitution requires prosecutors to make difficult pre-trial judgment calls regarding the potential materiality of exculpatory evidence, and to attempt to engage in the "totality of the circumstances" *Brady* analysis while only knowing a fraction of the relevant circumstances. "The significance of an item of evidence can seldom be predicted accurately until the entire record is complete." *Agurs*, 427 U.S. at 108. As a result, a prosecutor will always "be forced to make judgment calls about what would count as favorable evidence, owing to the very fact that the character of a piece of evidence as favorable will often turn on the context of the existing or potential evidentiary record." *Kyles*, 514 U.S. at 438-39; *see also* Daniel S. Medwed, Brady's *Bunch of Flaws*, 67 WASH & LEE L. REV. 1533, 1558 (2010) (noting prosecutors must make "an artificial, prospective assessment about how particular items of evidence fit within the jigsaw puzzle of a possible trial"). Even the most conscientious

prosecutor runs the risk of having a case unfold unexpectedly—which might portend a *Brady* violation—after electing to withhold certain evidence.

The fact that materiality is a moving target requiring some prediction on the part of prosecutors has never been accepted as a justification to narrow *Brady*. *See Kyles*, 514 U.S. at 439. *Brady* is premised not on a prosecutor's *actual* knowledge or the *known* effect of a piece of evidence on a case. Rather, when assessing the sufficiency of disclosure, the court assumes a prosecutor knows of exculpatory evidence possessed by members of his team, *Kyles*, 514 U.S. at 437-38, and "recognize[s] [the] significance" of exculpatory evidence he opts to withhold "even if he has actually overlooked it," *Agurs*, 427 U.S. at 110. The reviewing court passes no personal or professional judgment on the prosecutor who errs—"[i]f the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor." *Ibid*; *see also Brady*, 373 U.S. at 87. Thus, asking prosecutors to consider not only how evidence might play into a defense—but also how evidence might become amplified in light of subsequent events bearing on that information—does not, as the court below wrongly suggested, require prosecutors to "do the impossible and disclose evidence that does not yet exist." App. to Pet. for Cert. 36a; *see United States v. Diaz*, 176 F.3d 52, 107, 109 (2d Cir. 1999). Rather, it asks them to undertake a similar analysis to that which they already conduct.

Undoubtedly, this Court's endorsement of a rule allowing consideration of *all* available facts in analyzing materiality would encourage the prudent prosecutor to err on the side of disclosing information available pre-trial instead of "tacking too close to the wind."

Kyles, 514 U.S. at 439-40; *see also Agurs*, 427 U.S., at 108 ("[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure"). "This is as it should be." *Kyles*, 514 U.S. at 439. "The prudence of the careful prosecutor should not ... be discouraged." *Id.* at 440. The decision below encourages the opposite, however: It incentivizes prosecutors to amplify their chances of obtaining convictions by withholding exculpatory evidence and gambling that there will be no consequences post-conviction for failing to disclose evidence that, in hindsight, would have mattered to the preparation and presentation of the defense. *United States v. Olsen*, 737 F.3d 625, 633 (9th Cir. 2013) ("By raising the materiality bar impossibly high, the panel invites prosecutors to avert their gaze from exculpatory evidence, secure in the belief that, if it turns up after the defendant has been convicted, judges will dismiss the *Brady* violation as immaterial.") (Kozinski, J., dissenting from denial of rehearing en banc).

A true "totality of the circumstances" analysis of *Brady* materiality, taking into account post-conviction information, will also be administrable in the courts. The fact that a number of courts already follow this genuinely holistic approach provides the best evidence that all could feasibly do so. In fact, a contrary rule is likely to prove far more difficult to administer. The court would be put in the position of attempting to ignore post-conviction information that could significantly complement its assessment of how material to the defense directly-related (but undisclosed) evidence might have proven. That challenging task is neither advisable, nor consistent with the foundations of *Brady*. When the integrity of a guilty verdict is at

stake—which is the core concern of the *Brady* doctrine—arbitrary bright-line rules that promote nondisclosure have no place in this Court's jurisprudence.

CONCLUSION

For the reasons stated above and in Petitioners' briefs, the judgment below should be reversed and the convictions should be vacated.

Respectfully submitted,

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APPENDIX

The Innocence Network's member organizations include: the Actual Innocence Clinic at the University of Texas School of Law; After Innocence; Alaska Innocence Project; Arizona Justice Project; California Innocence Project; Center on Wrongful Convictions; Committee for Public Counsel Services Innocence Program; Connecticut Innocence Project/Post-conviction Unit; Duke Center for Criminal Justice & Professional Responsibility; Exoneration Initiative; George C. Cochran Mississippi Innocence Project; Georgia Innocence Project; Griffith University Innocence Project; Hawai'i Innocence Project; Idaho Innocence Project; Illinois Innocence Project; Innocence & Justice Project at the University of New Mexico School of Law; Innocence Project; Innocence Project Argentina; Innocence Project at UVA School of Law; Innocence Project London; Innocence Project of Minnesota; Innocence Project New Orleans; Innocence Project New Zealand; Innocence Project Northwest; Innocence Project of Florida; Innocence Project of Iowa; Innocence Project of Texas; Irish Innocence Project at Griffith College; Italy Innocence Project; Justicia Reinvindicada – Puerto Rico Innocence Project; Kentucky Innocence Project; Knoops' Innocence Project; Life After Innocence; Loyola Law School Project for the Innocent; Michigan Innocence Clinic; Michigan State Appellate Defender Office – Wrongful Conviction Units; Mid-Atlantic Innocence Project; Midwest Innocence Project; Montana Innocence Project; Nebraska Innocence Project; New England Innocence Project; New York Law School Post-Conviction Innocence Clinic; North Carolina Center on Actual Innocence; Northern California Innocence Project; Office of the Ohio Public

Defender, Wrongful Conviction Project; Ohio Innocence Project; Oklahoma Innocence Project; Oregon Innocence Project; Pennsylvania Innocence Project; Reinvestigation Project; Resurrection After Exoneration; Rocky Mountain Innocence Center; Sellenger Centre Criminal Justice Review Project; Taiwan Association for Innocence; The Association in Defence of the Wrongly Convicted; The Israeli Public Defender; Thurgood Marshall School of Law Innocence Project; University of Baltimore Innocence Project Clinic; University of British Columbia Innocence Project at the Allard School of Law; University of Miami Law Innocence Clinic; Wake Forest University Law School Innocence and Justice Clinic; West Virginia Innocence Project; Western Michigan University Cooley Law School Innocence Project; Wisconsin Innocence Project; Witness to Innocence; and Wrongful Conviction Clinic at Indiana University.

RECORD AND BRIEFS

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IN THE

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CHARLES S. TURNER, ET AL., *PETITIONERS,*

v.

UNITED STATES OF AMERICA, *RESPONDENT.*

RUSSELL L. OVERTON, *PETITIONER,*

v.

UNITED STATES OF AMERICA, *RESPONDENT.*

On Writ of Certiorari to the District of Columbia Court of Appeals

BRIEF OF AMICUS CURIAE WILFREDO LORA IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE WILFREDO LORA[1]

This brief is submitted to illustrate to the Court the severity of the problem of federal prosecutors failing to carry out their disclosure obligations under *Brady v. Maryland,* 373 U.S. 83 (1963). It also demonstrate why this Court should clarify and strengthen those obligations in reversing the judgment below under existing *Brady* jurisprudence.

The facts in this brief relating to the conviction of amicus Wilfredo Lora are taken from the petition for a writ of certiorari (No. 15-6826) and petition for a writ of habeas corpus (No. 15-6807) that he filed in October 2015. Lora's affidavit and supporting exhibits were attached as appendices to his habeas corpus petition, and they form the factual basis for his certiorari petition and his motion to certify filed in the Fourth Circuit, in which he sought permission to file a successive motion for a new trial. For convenience, the basis for the factual statements in this brief will cite to the motion to certify that was attached to amicus' certiorari petition ("App __").

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[1] This brief is being filed with the consents of all parties, which are being filed with the Court. No person other than amicus or his counsel has authored this brief in whole or in part or made a monetary contribution toward its preparation or submission.

SUMMARY OF ARGUMENT

Wilfredo Lora is a citizen of the Dominican Republic. After residing in the United States for more than 14 years, he was arrested and eventually convicted in 1999 in the United States District Court for the Eastern District of Virginia of being the ringleader of a massive drug conspiracy and sentenced to 292 months in federal prison. He was granted early release in November 2015. However, solely because of his drug conviction, he was deported to the Dominican Republic in December 2015, where he now lives.

From the moment of his arrest until today, Lora has maintained that he never participated in any drug conspiracy and that his conviction was obtained by the use of the false testimony of the witnesses against him. While in prison, he filed multiple pro se actions seeking release and/or a new trial, but none were successful. Eventually, he obtained copies of the presentence reports of the three key witnesses against him, which had never been provided to him or his counsel for trial, as required by *Brady v. Maryland*, 373 U.S. 83 (1963). As more fully explained below, the presentence reports for the two main witnesses contained evidence that directly contradicted their testimony against Lora, and the report of the third witness contained information regarding his crimes that was completely inconsistent with that witness's trial testimony. Shortly after receiving those pre-sentence reports, Lora obtained the pro bono services of undersigned counsel to represent him in seeking a new trial based on this newly discovered and wrongly withheld evidence.

Because Lora had filed prior motions to set aside his conviction and/or for a new trial, he had to obtain permission from the Court of Appeals for the Fourth Circuit to file a motion for a new trial in the district court in which he was convicted. Counsel filed a motion to certify, seeking that permission, in which he detailed the facts of Lora's *Brady* claims. Without requiring a response from the United States, the Court of Appeals denied the request, with no explanation. Lora then sought review in this Court, by both certiorari and habeas corpus, but again, the United States did not reply, and this Court denied review.

The *Brady* violation that Lora sustained shines an important light on the willingness of prosecutors to circumvent the requirements of *Brady*. First, it confirms that federal prosecutors either do not understand or do not follow the commands of *Brady* in situations where there can be no doubt as to its applicability: prior statements by key witnesses that directly contradict their trial testimony. To bring clarity to the mandate of *Brady*, this Court should require that all documents in the possession or control of the Government that contain information about testifying witnesses, such as the pre-sentence reports in Lora's case, should be automatically provided to defense counsel for use at trial, without filtration by Government counsel on the grounds that the information contained therein is either not exculpatory or not material.

Second, *Brady* violations are often discovered many years after a conviction, and in many cases after the defendant has filed

unsuccessful motions to set aside the conviction. When the courts of appeals receive a petition for leave to file a successive motion to set aside a conviction under 28 U.S.C. § 2255 based on alleged *Brady* violations, they should be directed to require a substantive response from the Government, so that there is an evidentiary basis on which the court can decide either to allow or deny the petitioner permission to seek relief in the district court. This procedure is especially important because the prosecutor alone knows why the *Brady* evidence was not produced at trial.

Third, because, as in this case, much *Brady* material is only uncovered long after a trial is concluded, this Court should no longer require defendants to shoulder the heavy burden of proving that the wrongly withheld evidence would have altered the outcome of the trial. Government lawyers already have little enough incentive to turn over *Brady* materials at trial, and if they fail to do so, the Government should be required to explain why that failure did not affect the outcome, instead of imposing that burden on the defendant, as the court below did in this case.

While such bright-line rules are not necessary for the Court to rule in favor of petitioners in this case, these straightforward proposals would do much to fulfill *Brady*'s "overriding concern with the justice of the finding of guilt" and would provide sorely needed guidance to Government counsel and lower courts on the scope and extent of the Government's *Brady* obligations. *United States v. Agurs*, 427 U.S. 97, 112 (1976).

ARGUMENT

THE JUDGMENT BELOW SHOULD BE REVERSED AND THE COURT'S OPINION SHOULD CLARIFY AND RE-ENFORCE THE OBLIGATIONS OF PROSECUTORS UNDER *BRADY*.

A. The Refusal of Government Counsel to Produce Vital *Brady* Material at Lora's Trial Demonstrates the Seriousness of the Problem.

After a two day trial, Lora was convicted of a conspiracy to distribute five kilograms of cocaine and one kilogram of heroin that was alleged to have begun in 1986 and continued until he was arrested in August 1998. The only evidence against him was the testimony of eleven convicted felons, all of whom claimed to have been part of this conspiracy, and all but one of whom was then in federal prison for drug-related offenses. The witnesses all claimed that the hub of the conspiracy was Willie's Auto Body Shop owned and operated by Lora in Northwest Washington DC. Despite the length of this conspiracy, there were no drugs seized or offered in evidence, no documents or other tangible evidence supporting the charge, and no Drug Enforcement Agent who claimed to have witnessed the operation or offered any corroborating evidence.

Lora has maintained his innocence from the time of his arrest to date. His appeal from his conviction was denied, as were his efforts to have his sentence reduced. He subsequently filed numerous motions and appeals attacking his

conviction, all pro se, and all unsuccessful. In the fall of 2014, he finally obtained the presentence reports of two key witnesses in his trial, which, together with another report that he had obtained several years before, provided a very strong basis for Lora's new trial motion.

The most significant of the pre-sentence reports was that of Franklin Cano, who was the Government's first witness and who described the alleged drug conspiracy in greatest detail. App. 6-7. Cano testified that he came to the United States in 1982, started selling drugs illegally with Lora in New York City in 1987, and continued doing that with Lora until he moved to Maryland in 1990. Cano testified that he commuted to Washington, DC, mostly by airplane, to traffic multiple kilograms of cocaine at a time. According to Cano, he would meet Lora at National Airport and bring as much as 25 or 50 kilograms of cocaine at a time to the auto body shop that Lora allegedly owned at that time. Thus, crucial to Cano's accusations is the time—1987 to 1990—that he claimed he was delivering drugs from New York to Lora in Washington.

Cano had been convicted of a federal drug offense. That fact was known to Lora and his defense counsel, but they were never provided Cano's January 1996 presentence report for that offense, to which the U.S. Attorney's office plainly had access at the time of trial. When Lora obtained that report (App. 6-7), it revealed that Cano did not live in New York from 1987 to 1990 as he testified. More importantly, Cano could not have been engaged in the alleged conspiracy as early as 1987

because that report stated that Cano studied and worked in Puerto Rico from the early 1980s until April 1988, when he moved to the United States, coming to Washington, not New York that September. In addition, an application that Cano filed with the INS (App. 7), confirmed that Cano came to Puerto Rico, not New York City, in 1982, where he lived until 1988. In neither of these official documents is there any reference to his living or working in New York. And when Cano came to the Washington area, the presentence report states that, from December 1988 to February 1990, he worked for a cleaning company at Washington National Airport, and that he worked at another cleaning company in Rockville from August 1990 to November 1992. App. 7.

Presentence reports are not routine government documents, subject to all the frailties of human reporting. Rather, they are prepared by federal probation officers from information that they are given by the defendant, verified with information from third parties (such as former employers, as happened for Cano), and then used by the Government in suggesting a sentence and by sentencing judges in imposing one. In short, presentence reports are not just any evidence, but are highly reliable and could not be rejected by a jury without some explanation, which could not have happened here because the report was not provided to Lora's lawyer for use at trial. Moreover, Cano's testimony was hardly of peripheral relevance to the case against Lora. As is clear from the prosecutor's closing statement at trial (App. 8), the core of the alleged conspiracy was

that Cano trafficked drugs from New York to Washington, where they were allegedly delivered to Lora's body shop. Thus, the evidence that Cano lied about crucial elements of the charges against Lora was unrebutted, and thereby established the factual basis for his *Brady* claim.

The presentence report that forms the basis of the second *Brady* violation is that of Roberto Rodriguez prepared in connection with his December 1991 sentencing for cocaine distribution. App. 10. Rodriguez was the only Government witness against Lora who was not then incarcerated in a federal facility although, as an alien and a convicted felon, he was under an order of deportation. Rodriguez testified at trial that he worked for Lora from March 1989 to May 1991 at his body shop in Washington DC, where he witnessed the drug conspiracy alleged in the indictment, including delivery of cocaine at National Airport.

Rodriguez's presentence report tells a very different story for that period. App. 10-11. In direct contradiction of his trial testimony that he worked for Lora in 1989-1991, the report states that Rodriguez worked at Falls Church Auto Body Shop from March 1988 to January 1990 and at Craftsman Auto Body Shop in Chantilly, Virginia, from September 1990 to April 1991. The presentence report makes no mention of Rodriguez's employment starting in 1989 at Willie's Auto Body Shop, or at any entity related to Lora, or at any other place in the District of Columbia. Unless Rodriguez was working two jobs,

and told the presentence investigator about only one of them, his testimony at trial is false. [2]

The third significant presentence report is that of Leopoldo Perez, also a convicted drug dealer and labeled a "major supplier" in his presentence report. App. 8. He claims to have participated in Lora's drug conspiracy from 1993 to the time of his arrest in December 1996. App. 8-9. His prior drug conviction was for an offense that took place from the summer of 1994 until late 1996. The details are spelled out in full in his presentence report and in the Statement of Facts to which he and the Government agreed when he pled guilty. Those factual descriptions are most significant for what they do *not* say. Even though Perez's trial testimony was that he was involved with Lora from 1993 until his arrest in November 1996, these two detailed statements of facts against him covering most of the same period never mention Lora or Willie's Auto Body Shop.

This omission is significant for several reasons. The arrest of Perez and his co-conspirators was based on extensive DEA surveillance, yet there is no mention of Lora in either document, even though Perez was supposedly dealing heavily with him during this

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[2] There was another serious flaw in the testimony of Rodriguez and Cano. Official government records attached as exhibits to Lora's affidavit confirm that Lora only owned Willie's Auto Body Shop from January 1994 until July 1996, far after the periods in which those witnesses alleged the conspiracy took place. App. 13.

same time period. Indeed, the DEA did not come after Lora until August 1998, which suggests that they were unaware of Perez's alleged dealings with Lora in 1993-1996 or, more likely, that there were no such dealings. In addition, the Perez prosecution was supported by evidence from DEA agents and seized drugs, neither of which were present in Lora's case. Finally, if Perez had evidence about Lora's illegal activities when he was sentenced in 1996, he surely would have come forward with it then in order to obtain a reduction in his sentence, instead of only after Lora was arrested and indicted two years later.

These undisputed facts are living proof of the conclusion drawn by then-Chief Judge Alex Kozinski, dissenting from the denial of rehearing en banc in *United States v. Olsen,* 737 F.3d 625, 626 (9th Cir. 2013): "There is an epidemic of *Brady* violations abroad in the land. Only judges can put a stop to it." The documents withheld – pre-sentence reports of three key witnesses – are plainly relevant in any criminal trial, especially when there was no evidence beyond the trial testimony of the prosecution's witnesses. Because the witnesses were all convicted of federal drug felonies, the Office of the U.S. Attorney surely knew how important presentence reports are and either had the reports (to defend against cross-examination by Lora's trial counsel) or could easily obtain them. Defendants are not required to make a specific request for *Brady* material, and this Court has held that *Brady* applies to impeachment as well as direct exculpatory evidence. *United States v. Bagley*, 473 U.S. 667, 676 (1985). Thus,

there can be no doubt that the presentence reports in Lora's case were *Brady* material that should have been turned over for trial, and little doubt that had they been available to defense counsel, the trial and almost certainly the verdict would have been very different.

Lora's facts are also important because they demonstrate the need for the Court to spell out in detail the kinds of evidence that clearly comes within the *Brady* mandate. These would include presentence reports, prior statements of testifying witnesses, statements of other fact witnesses not called for trial, results of forensic testing (whether used or not), and any other evidence (admissible or not) that *might* be useful to the defense. Years after a trial, when *Brady* materials eventually surface, the trial judge is asked to decide "whether in its absence [defendant] received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). That necessarily artificial and hypothetical inquiry would be avoided if prosecutors carried out their *Brady* duties properly, because the jury would have had the evidence in making its determination of guilt or innocence, instead of asking courts to speculate on the significance of the withheld evidence years later. As the Court has previously instructed, the message that prosecutors should receive is that all doubts should be resolved in favor of disclosure to the defense. *See Kyles*, 514 U.S. at 439; *Agurs*, 427 U.S. at 108. Yet, as in Lora's case, prosecutors often follow the contrary presumption, confirming the need for further guidance from this Court.

B. When a Prima Facie *Brady* Claim is Presented, Prosecutors Should Be Directed to Respond Substantively in All Cases.

In this case, the petitioners were fortunate in one respect: they had not made previous post-conviction motions to set aside their convictions before they obtained the exculpatory evidence that *Brady* required be made available at trial. Lora faced an additional hurdle, frequently arising in cases like his. Because Lora, acting pro se, had filed previous motions to vacate his conviction, he was barred by 28 U.S.C. § 2255(h) from filing a successive motion without first obtaining permission from the Fourth Circuit via a motion to certify. His recently-obtained counsel filed that motion on September 24, 2015, accompanied by Lora's affidavit, exhibits, and a proposed memorandum in support of the motion to vacate his conviction based on the Government's failure to provide him with these exculpatory pre-sentence reports

The Fourth Circuit did not ask the United States to respond, and so it was undisputed that the evidence that Lora submitted was (a) newly discovered under 28 U.S.C. § 2255(h)(1), and (b) filed within the one year discovery limitation under 28 U.S.C. § 2255(f)(4). App. 4. Accordingly, the only legitimate basis on which the Court of Appeals could have denied the motion was that, "in light of the evidence as a whole, [the facts] would [not] be sufficient to establish by clear and convincing evidence that, but for the constitutional error, no reasonable factfinder would have found the movant

guilty of the underlying offense." 28 U.S.C. § 2244(b)(1)(B)(ii). Given the factual record presented on Lora's *Brady* claims, it is impossible to understand the basis on which the Court of Appeals reached a contrary conclusion in its six word order denying Lora's motion.

In contrast to Lora, the petitioners here did not have to obtain permission to file a motion for a new trial. They simply filed their motion, and the United States had to respond on the merits. At that point, the trial and appellate courts had a record on which to decide whether there was a *Brady* violation and if so, whether petitioners were entitled to a new trial. As this Court observed in *Kyles,* 514 U.S. at 521, the answer to that question "turns on the cumulative effect of all such evidence suppressed by the government." And while the suppressed evidence must be material, that does not "require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." *Id.* at 434.

The briefs of petitioners amply demonstrate that the Court's existing materiality standard has been met in this case. However, there is an additional point to be made that applies to the very many cases where newly-discovered *Brady* material is the basis of the motion and permission must be sought to file a motion for a new trial. In Lora's case, the court of appeals (and subsequently this Court) did not ask for a response from the United States, but rejected Lora's motion and provided no reason for doing so. Where, as in Lora's case, a prima facie *Brady* claim is made, the

Government typically responds that the new *Brady* evidence would not have had the required impact had it been available at trial. However, for an appellate court, which must answer this question as part of its "gatekeeping" function, *Felker v. Turpin,* 518 U.S. 651, 657 (1996), it must have the legal and factual positions of both sides. When there are *Brady* claims, a court cannot make a reasoned determination to *deny* the motion to allow the district court to decide the new trial motion on the merits without *some* explanation from the Government as to why the failure to disclose was not significant. Yet that is just what the Fourth Circuit did to Lora, saying only that it "denies" his motion.

The court's lack of justification for the denial or Lora's motion to certify is itself problematic, but the best cure for that is to be sure that the gatekeeper courts have the information that they need to make a supportable ruling. That means instructing those courts to demand a prompt response from the Government in every *Brady* case in order to meet the thirty day decision requirement in 28 U.S.C. § 2244(b)(3)(D). And to assure that the courts of appeals perform their gatekeeper function properly, they should be require to explain the basis for any denial of a motion to certify. That explanation is particularly important because the following subparagraph, 28 U.S.C. § 2244(b)(3)(E), precludes a defendant from seeking rehearing of a denial and also precludes any appeal or petition for certiorari.

C. The Burden of Obtaining a New Trial When a *Brady* Violation Has Been Established Should Be Minimal.

The lower courts in this case imposed a heavy burden on petitioners to establish their entitlement to a new trial. That was error, mainly for the reasons given by petitioners in their briefs. But it was also error because that kind of burden also increases the incentive for prosecutors *not* to turn over *Brady* material at trial, when it would be most useful to the defense. Thus, in any case in which there is a doubt as to whether there is *Brady* material that must be disclosed, if prosecutors know that they will be able to retain an undeserved conviction because the defendant will be unable to show that the unavailable evidence would have mattered to the verdict, they will be tempted to withhold the evidence.

Once prosecutors become convinced of a defendant's guilt, it is natural for them to do nothing that might prevent a conviction, which includes turning over any evidence that might be exculpatory — unless *Brady* commands them to do otherwise. *Brady* already imposes an affirmative disclosure obligation on prosecutors, and yet, as Judge Kozinski observed, *supra,* the epidemic of *Brady* violations continues. A major reason for that is that, even if a *Brady* violation is discovered, and the defendant is permitted to file a motion for a new trial, the prosecutors are likely to succeed in persuading the lower courts, as they did here, that the new evidence would not have mattered.

The simplest way to decrease the incentives for withholding exculpatory and impeachment material from the defense counsel is to place the burden of proving that a new trial is not warranted on the party that withheld that material in the first place — the Government. Of course, even in that situation, prosecutors may be able to justify the withholding, and if they cannot, they can still retry the defendant. Nevertheless, placing the burden on the prosecution to explain why a new trial is not warranted when exculpatory and impeachment material has been withheld would strengthen the incentives for prosecutors to make upfront disclosures of information favorable to the defense, which is the goal of *Brady* in the first instance.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment below under its current *Brady* standard. Furthermore, the Court's opinion should spell out in detail the obligations of all prosecutors under *Brady* so that the evidence favorable to the defense is turned over for trial and not many years later, when the courts are left the very difficult task of determining what impact that evidence would have had if it been timely produced.

Respectfully submitted,

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On Writs of Certiorari to the District of Columbia Court of Appeals

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BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice.

NACDL wishes to emphasize to the Court that a court assessing the materiality of suppressed evidence should consider how that evidence would have shaped the narrative that defense counsel presented at trial. Academic studies and scholarship stress the importance of defense counsel's ability to present a coherent narrative to the jury, including the narrative that someone else committed the crime. The evidence suppressed here would have permitted the various defense attorneys to present a common narrative exonerating all of the defendants of the Fuller murder and pointing to an alternative perpetrator, and it

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* made such a monetary contribution. Both parties have submitted letters of consent to the filing of all *amicus* briefs with the Clerk of the Court pursuant to Rule 37.3 (a).

is reasonably likely that the result would have been the petitioners' acquittal.

SUMMARY OF THE ARGUMENT

As the petitioners have argued, the court of appeals misstated and misapplied the *Brady* standards that this Court has articulated. The lower court further erred in failing to appreciate how defense counsel would have used the suppressed evidence to build an alternative narrative to counter the prosecution's case, and how defense counsel developed conflicting strategies in its absence.

ARGUMENT

I. THE STRENGTH AND COMPLETENESS OF A CRIMINAL DEFENDANT'S NARRATIVE IS CRITICAL TO HIS SUCCESS AT TRIAL.

Scholarship suggests that a party's presentation of a narrative at trial plays a key role in jurors' decision-making processes; it follows that the defense attorney's ability to tell a "plausible and complete story" establishing his client's innocence plays a critical role in influencing the jury's verdict. John H. Blume et al., *Every Juror Wants a Story: Narrative Relevance, Third Party Guilt and the Right to Present a Defense*, 44 Am. Crim. L. Rev. 1069, 1100 (2007); see also David S. Schwartz & Chelsey B. Metcalf, *Disfavored Treatment of Third-Party Guilt Evidence*, 2016 Wis. L. Rev. 337, 341 (2016) ("Jury research has long established that jurors tend to base decisions on the presentation of a persuasive story, the strength of which is judged in part on the completeness of key story elements") (citing Blume, *supra*, at 1087–88; Nancy Pennington & Reid Hastie, *A Cognitive Theory*

of Juror Decision Making: The Story Model, 13 Cardozo L. Rev. 519 (1991)).

This Court has recognized the importance of presenting coherent narratives in criminal trials. In *Old Chief* v. *United States*, 519 U.S. 172, 191 (1997), this Court acknowledged the importance of a party (there, the government) presenting the most compelling story that it can given the available evidence, noting that evidence "has force beyond any linear scheme of reasoning, and as its pieces come together, a narrative gains momentum." *Id.* at 187 (specifically discussing the principle that the government may present its case as it sees fit). Stressing that the best advocates "tell[] a colorful story with descriptive richness," the Court explained, "[a] syllogism is not a story, and a naked proposition in a courtroom may be no match for the robust evidence that would be used to prove it." *Id.* at 187, 189.

This Court again addressed the importance of presenting coherent narratives in criminal trials in *House* v. *Bell*, 547 U.S. 518 (2006). In *House*, the petitioner sought habeas relief on the grounds that new evidence had been uncovered exculpating him, namely DNA evidence establishing that the semen on the victim's clothing belonged to the victim's husband and not to the petitioner. *Id.* at 540. Even though sexual contact was not an element of the offense charged, the Court sided with the petitioner, recognizing how important the evidence of sexual assault had been to the prosecution's narrative at trial. *Id.* Without such evidence, the Court found, "a central theme in the State's narrative linking [the petitioner] to the crime" would have been lost, and the jury's view of the case may very well have differed. *Id.* at 541 (noting that the other evidence against the peti-

tioner, "while still potentially incriminating, [may have] appear[ed] less suspicious").

In short, it is clear that juries expect and respond to narratives in criminal cases. It follows that when a prosecutor withholds exculpatory evidence and as a result significantly alters the narrative that the defendant is able to present at trial, the reviewing court's confidence in the verdict should be shaken, and it should thus strongly suspect a *Brady* violation. See John B. Mitchell, *Evaluating* Brady *Error Using Narrative Theory: A Proposal for Reform*, 53 Drake L. Rev. 599, 621 (2005) (arguing that a case should be "on the path to reversal" where the defense would have presented either a "plausible, different story" or a "significantly more persuasive" story with evidence that the prosecution withheld); see also *Kyles* v. *Whitley*, 514 U.S. 419, 434 (1995) (quoting *United States* v. *Bagley*, 473 U.S. 667, 678 (1985)) (favorable evidence is material under *Brady* where its suppression "undermines confidence in the outcome of the trial").

Among the narratives that a defense attorney could use to create reasonable doubt, the defense that someone other than the defendant committed the crime in question is particularly compelling. In a 2009 academic study where 253 college students participated as mock jurors, researchers' findings indicated that jurors were significantly more likely to acquit a defendant who could point to a specific alternative perpetrator than one who simply argued his innocence. Elizabeth R. Tenney et al., *Unpacking the Doubt in 'Beyond a Reasonable Doubt': Plausible Alternative Stories Increase Not Guilty Verdicts*, 31 Basic & Applied Soc. Psychol. 1.[2] The notion that an

[2] Notably, the study's findings also suggested that presenting more than one alternative perpetrator made acquittal marginally more likely than presenting only one alternative perpetrator.

alternative-perpetrator defense can sway jurors is also supported by precedent finding alternative-perpetrator evidence material under *Brady*. See *Kyles*, 514 U.S. at 445–49 (1995) (suppressed inconsistent statements by a police informant suggesting that the informant sought to frame the defendant and had committed the crime himself material); see also, *e.g.*, *Williams* v. *Ryan*, 623 F.3d 1258, 1265 (9th Cir. 2010) (quoting *Boyette* v. *Lefevre*, 246 F.3d 76, 91 (2d Cir. 2001)) (acknowledging that alternative-perpetrator evidence is "classic *Brady* material"). Notably, while many jurisdictions have rules restricting the use of alternative-perpetrator evidence, this Court has indicated that defendants have a constitutional right to raise this defense without arbitrary interference by the state. See *Holmes* v. *South Carolina*, 547 U.S. 319, 330–31 (2006) (quoting *Crane* v. *Kentucky*, 476 U.S. 683, 690 (1986)) (reversing as unconstitutional an "arbitrary" state supreme court ruling which effectively barred defendants from presenting alternative-perpetrator evidence where the state's evidence was particularly strong, holding that the ruling violated defendants' right to "a meaningful opportunity to present a complete defense"). The prosecution's decision to withhold evidence in this case prevented the petitioners from advancing an effective alternative-perpetrator theory, and this was likely decisive in the trial's outcome.

II. DEFENSE COUNSEL WOULD HAVE CRAFTED A COMPELLING COMMON NARRATIVE TO REBUT THE PROSECUTION'S CASE WITH THE EVIDENCE SUPPRESSED HERE.

In dismissing the evidence suppressed here as immaterial, the court of appeals speculated about how jurors could have discounted it without properly con-

sidering how defense counsel would have presented it. Petition for a Writ of Certiorari at 51a–59a, *Overton* v. *United States*, No. 15-1504 (June 10, 2016) (finding the withheld evidence immaterial because the evidence, "in its entirety, and however appellants would have developed it," would not have "led the jury to doubt *virtually everything* that the government's eyewitnesses said about the crime") *id.* at 58a. The court's analysis treated each piece of withheld evidence as an inconvenient footnote in the government's case that the prosecution would have rebutted without pushback, and failed to appreciate the obvious effect of having ten sets of defense counsel assemble them into a coherent, common narrative. See *id.* at 51a–59a. The suppressed evidence would have specifically indicated that: one or more perpetrators other than the defendants murdered Mrs. Fuller, the government's investigation was incomplete, and there were very few assailants. In turn, it would have supported a narrative that all of the defendants were innocent and that James McMillan (with or without an accomplice) was the perpetrator.

A. McMillan Evidence.

The defendants knew at trial that witness William Freeman had seen two men enter the alley after Freeman found Mrs. Fuller's body, linger for several minutes, and then flee when police arrived. They also knew that neither man was a defendant, that one of the men (according to Freeman) was carrying an unknown object, and that Freeman had seen both men loitering suspiciously on a street near the alley earlier that day. However, the prosecution suppressed the fact that Freeman (and two other witnesses) could identify one of these men as James McMillan, along

with other information related to McMillan[3]. Without the suppressed evidence, the defendants could not effectively present these other men as plausible alternative suspects; the prosecution's closing dismissed Freeman's failure to identify these men as defendants, calling it a "[a] smokescreen" that had "[n]othing" to do with Mrs. Fuller's death. Transcript of Proceedings at 462, *United States* v. *Catlett* (Dec. 6, 1985) (hereinafter "Dec. 6, 1985 Tr."). The evidence suppressed was actually critical, because with it defendants would not have presented McMillan as a faceless, nameless bystander who happened to flee when the police arrived. Each defense attorney could have approached the jury with an alternative suspect who lived in the area, had been identified at the scene by several adult witnesses, had violently assaulted and robbed two other middle-aged women in the area (by himself and with one other person, respectively) within a month of the attack, and had been approached by investigators. While McMillan was not identified as an attacker by any prosecution witness, this could have cast doubt on these witnesses had the defendants introduced McMillan as an alternative perpetrator based on the facts above. These facts combined would likely have made McMillan a credible suspect in the eyes of the jury and sowed doubt about the petitioners' guilt.

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[3] Namely that McMillan had a record of violent crimes, that he lived in the area that he violently assaulted two other middle-aged women in the area in the month following the Fuller murder, that he had been approached by investigators and declined to be interviewed, and that one of the other witnesses confirmed that he was acting suspiciously at the crime scene and had an object under his coat.

B. Blue Evidence.

Witness Ammie Davis' statement implicating a man named James Blue in the murder, and the government's lack of diligence in investigating Blue, would have permitted defendants to attack the thoroughness of the government's investigation. Davis identified Blue to police in October 1984 as Fuller's sole attacker and described a number of specific details about the crime. Blue was unconnected to the defendants, had served time in jail for assault and had arrests for rape, armed robbery and forcible sodomy. Investigators took no action with respect to Davis' statement until August 1985, when the prosecution finally interviewed her and dismissed her statement as lacking credibility. Blue killed Davis for unrelated reasons prior to trial, and the prosecution declined to notify any defendant of Davis' account.

As the petitioners have argued, the disclosure of Davis' statement would at the very least have given the defendants the opportunity to discredit the investigation and the prosecution's failure to diligently pursue any evidence not supporting its group attack narrative.

C. Luchie Evidence.

The prosecution withheld other evidence that would have directly undercut the group attack theory at the core of its case: the statements of witnesses Willie Luchie, Ronald Murphy and Jackie Watts, who passed through the alley only a half hour before Fuller's body was discovered in the garage. Not only did these witnesses apparently not see any group in the alley, but Luchie and Watts heard the sound of groans coming from behind the closed doors of the garage – a garage too small to occupy more than a few people. Every defendant could have used this ev-

idence to undermine the prosecution's theory that Mrs. Fuller was attacked by a large group, and thus establish that at least most of the defendants were innocent. This in turn would have suggested that all of the defendants were innocent, given that a single-perpetrator or small-group theory was incompatible with the prosecution's purported eyewitness testimony.

D. Cumulative Effect

Armed with all of this suppressed evidence, defense counsel would have presented a coherent, common narrative: that James McMillan killed Mrs. Fuller, that none of the defendants were guilty, and that the government's investigation had led it in the wrong direction. This narrative would have given the defendants a perpetrator to point to other than one-another or a cooperating witness; thus, defense counsel could have avoided relying on any part of the prosecution's evidence (and any part of the prosecution's narrative), and instead invited the jury to question all of it. This narrative would have been complemented by the evidence that undermined the prosecution's case in the actual trial.

Importantly, the prosecution's own story clearly lacked narrative integrity. Despite the court of appeals' conclusion that the jury found the prosecution's witnesses credible, the jury (after a week of deliberations) acquitted two defendants and deadlocked on two others (ultimately convicting them only after dozens of additional votes). Especially in this context, it is reasonably likely that presenting the above narrative would have left the jury with reasonable doubt as to every petitioner's guilt. The court of appeals

erred in concluding otherwise where the jury did not even hear this narrative.[4, 5]

III. THE PROSECUTION'S *BRADY* VIOLATIONS FORCED DEFENDANTS TO ADOPT STRATEGIES THAT SUPPORTED THE PROSECUTION'S NARRATIVE.

The prosecution's actions left the evidence in a state that fractured the defense. Unable to effectively build a common narrative amongst themselves, some attorneys relied-on and attacked different witnesses, undermined their client's codefendants, and suggested that while a group of attackers may have existed, his or her own client was not part of it. This is apparent from a cursory review of the defendants' closing arguments. See, *e.g.*, Dec. 6, 1985 Tr. at 359–61 (petitioner Charles Turner's counsel stresses conflicts between his alibi and petitioner Rouse's and attacks Rouse's credibility), *id.* at 365 (Turner's counsel suggests in his closing that even if the jury can find five perpetrators guilty "in five minutes," this group should not include Turner); *id.* at 398–99 (defendant Webb's counsel asserts that prosecution witnesses Melvin Montgomery and Maurice Thomas are credible); Transcript of Proceedings at 125–27, 133–41, *United States* v. *Catlett* (Dec. 4, 1985) (hereinafter

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[4] While certain defense counsel seemed to challenge the government's group-attack theory in their closings as nonsensical, *see infra*, at 11, they lacked the evidence to build this challenge into an effective alternative narrative.

[5] As defendant Harris' trial counsel, Michele Roberts, later testified during the petitioners' post-conviction hearing, the suppressed evidence pointing to alternative perpetrators "'would have been particularly helpful, especially given how the community at large and presumably the jury as well emotionally responded' to the crime." Brief for Petitioners at 22, *Turner* v. *United States*, Nos. 15-1503 & 15-1504 (Jan. 27, 2017).

"Dec. 4, 1985 Tr.") (petitioner Catlett's counsel attacks both Montgomery and Thomas' credibility); *id.* at 151–55, 160 (defendant Harris' counsel notes that Montgomery implicated other defendants but not her client, notes that generally more evidence exists against the others than against her client, and accepts that cooperating witness Bennett killed Mrs. Fuller "with the assistance of others"); Dec. 6, 1985 Tr. at 390–94 (Webb's counsel accepts that cooperating witnesses Bennett and Alston truthfully testified to killing Mrs. Fuller, declaring Alston's involvement "absolute fact.")[6]; see also Saundra Saperstein & Elsa Walsh, *Ten Defendants Complicate Trial: Murder Case Attorneys Often Find Themselves at Cross-Purposes*, Wash. Post, Nov. 17, 1985, at A1 (describing defense counsel in the case objecting during each other's examinations and otherwise acting adversely to their clients' codefendants). Even those defense attorneys who challenged the group attack theory lacked the evidence to build an alternative narrative of their own. Transcript of Proceedings at 244, *United States* v. *Catlett* (Dec. 5, 1985) (Rouse's counsel states that "the illusion of a gang killing, a group effort" does not "make any sense").

Exploiting a situation that it helped create, the prosecution stressed the defendants' disunity and lack of a common narrative in its closing argument. The prosecution characterized their "ten arguments" as each stating, "[T]he believable witnesses are the witnesses who didn't say my client was there. The unbelievable witnesses are the witnesses who say my client was there." Joint Appendix at 185, *Turner* v.

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[6] *Amicus* contends that, armed with the withheld evidence, defense counsel would not have even accepted that cooperating witnesses Alston and Bennett were involved in the murder, as certain defense counsel did.

United States, No. 15-1503 & *Overton* v. *United States*, No. 15-1504 (Jan. 27, 2017). Over the objections of defense counsel, the prosecution specifically emphasized how different defendants' closing arguments attacked and defended the credibility of different prosecution witnesses. Dec. 6, 1985 Tr. at 428–30. It is difficult to conclude that the withheld evidence was immaterial where the prosecution's own closing cited a problem directly fostered by its absence.

Amicus urges the Court to consider how the various defense attorneys' closing arguments would have changed had they been armed with the evidence that the prosecution suppressed. See Mitchell, *supra*, at 620–21 (proposing that appellate courts applying *Brady* should compare the best closing argument that a defense attorney could have given with the evidence he had with the best closing argument he could have given with the withheld evidence). Had this evidence been disclosed, defense counsel would have harmonized their trial strategies and crafted an alternative narrative that likely would have left jurors with reasonable doubt as to all of the petitioners.

CONCLUSION

For the foregoing reasons, the judgment of the D.C. Court of Appeals should be reversed.

Respectfully submitted,

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RECORD AND BRIEFS

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v.

UNITED STATES OF AMERICA,

Respondent.

RUSSELL L. OVERTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writs Of Certiorari To The District Of Columbia Court Of Appeals

BRIEF OF AMICI CURIAE TEXAS PUBLIC POLICY FOUNDATION, FREEDOMWORKS, CAUSE OF ACTION INSTITUTE, AND AMERICAN LEGISLATIVE EXCHANGE COUNCIL IN SUPPORT OF PETITIONERS AND URGING REVERSAL

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Board of Congress

QUESTION PRESENTED

Whether the petitioners' convictions must be set aside under *Brady v. Maryland*, 373 U.S. 83 (1963).

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INTEREST OF AMICI CURIAE[1]

The Texas Public Policy Foundation is a nonprofit, nonpartisan research organization based in Austin, Texas, and is dedicated to promoting liberty, personal responsibility, and free enterprise through academically-sound research and outreach. Since its inception in 1989, the Foundation has emphasized the importance of limited government, private enterprise, private property rights, and the rule of law. In accordance with its central mission, the Foundation has hosted policy discussions, authored research, presented legislative testimony, and drafted model ordinances to advance principles of liberty and the Constitution.

The mission of FreedomWorks is to build, educate, and mobilize the largest network of activists advocating the principles of smaller government, lower taxes, free markets, personal liberty, and the rule of law.

Cause of Action Institute ("CoA") is a nonprofit, nonpartisan government oversight organization that uses investigative, legal, and communications tools to educate the public on how government accountability, transparency, and the rule of law work together to protect liberty and economic opportunity. As part of this mission, CoA works to expose and prevent government and agency misuse of power by, *inter*

[1] Under S.Ct. R. 37.6, counsel for amici state that no counsel for a party authored this brief in whole or in part, and that no person other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent from all parties are being lodged with the Court under Rule 37.3(a).

alia, appearing as amicus curiae before this and other federal courts. *E.g.*, *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1460 (2014) (citing brief).

CoA has a particular interest in challenging government overreach in the criminal justice system and in working to combat the criminalization of conduct that can be addressed through existing civil law—*i.e.*, the process of "overcriminalization." In order to fulfill this mission, CoA has represented criminal defendants in federal court, *e.g.*, *United States v. Black*, No. CR 12-0002 (N.D. Cal.) (involving a Marine Mammal Protection Act regulation criminalizing "feeding" certain marine mammals without a permit), appeared as amicus curiae in *Yates v. United States*, 135 S. Ct. 1074 (2015), at both the merits stage and in support of the petition for a writ of certiorari, and appeared as amicus curiae to argue for the application of the *Brady v. Maryland* standard in a civil case, *United States v. Sierra Pacific Industries, Inc., et al.*, No. 15-15799 (9th Cir. 2015).

The American Legislative Exchange Council (ALEC) is the nation's largest nonpartisan individual membership association of state legislators. Approximately 25% of state legislators are ALEC members. It serves to advance limited government, free markets, and federalism.

SUMMARY OF THE ARGUMENT

1. As petitioners' briefs demonstrate, the Court should reverse the judgment below under settled law, including *Wearry v. Cain*, 136 S. Ct. 1002 (2016) (per curiam), and *Kyles v. Whitley*, 514 U.S.

419 (1995). But the case also affords an opportunity to clarify and strengthen the *Brady* disclosure obligation. In particular, the Court should hold that the government violates the defendant's right to due process when it suppresses favorable evidence, regardless of the potential effect of that evidence on the outcome of a future trial. On appeal, the Court should abandon the current materiality standard and instead require reversal of the conviction for failure to disclose favorable evidence unless the government can establish that the error is harmless beyond a reasonable doubt.

2. The materiality component of *Brady*, as applied by the courts, has robbed the doctrine of much of its force. In the pretrial context, materiality requires prosecutors to anticipate, before they even know the outlines of the defense, whether disclosure of a particular piece of favorable evidence has a reasonable probability of producing a different outcome in a yet-to-be-held trial. That is a difficult task even for a conscientious prosecutor. For an unethical or indifferent prosecutor, a pretrial materiality requirement is an invitation to withhold favorable evidence based on an asserted perception that the evidence against the defendant is overwhelming, or to not look for such evidence in the first place.

The materiality requirement has proven unworkable on appeal as well. To obtain reversal, the defendant has the burden of establishing that the suppressed evidence was material. That can be hard to show on a cold record, given the complex mix of evidence that most trials produce. In light of the

inherent uncertainty in assessing the impact of an undisclosed piece of evidence, appellate courts find in the overwhelming majority of cases that the failure to disclose was not material. And because convictions are rarely reversed even when the prosecution suppresses favorable evidence, prosecutors have little incentive to take their disclosure obligations seriously.

3. Efforts to correct the problems with materiality have fallen short. Federal legislation requiring disclosure of favorable evidence regardless of materiality has failed because of trenchant Department of Justice resistance. Even if such legislation were ultimately enacted, it would not address application of *Brady* in state prosecutions. Pretrial rulings by some district courts ordering production of favorable evidence without regard to materiality are in tension with this Court's decisions and do not solve the problem that the materiality requirement presents on appeal. Other judicial approaches have similarly fallen short. The solution to the materiality problem thus lies with this Court.

4. By clarifying that prosecutors have a duty to disclose favorable evidence regardless of its potential effect on the outcome of a future trial, the Court will draw a clear constitutional line, consistent with the fairness principle that undergirds *Brady*. Prosecutors will have no doubt about the scope of their duty to disclose: if evidence is favorable, either because it exculpates the defendant or impeaches a prosecution witness, it must be produced to the defense. On appeal, replacing the materiality standard with the well-established *Chapman*

constitutional harmless error test will provide robust protection to the defendant's right to due process while avoiding reversals where the undisclosed evidence is truly trivial or unimportant.

ARGUMENT

I. THE *BRADY* MATERIALITY REQUIREMENT HAS PROVEN UNWORKABLE IN PRACTICE.

In *Brady*, this Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). In later cases, the Court concluded that suppressed evidence is "material" if there is "any reasonable likelihood it could have affected the judgment of the jury." *Wearry v. Cain*, 136 S. Ct. 1002, 1006 (2016) (per curiam) (quotations omitted); *see, e.g., Kyles v. Whitley*, 514 U.S. 419, 434-35 (1995). A *Brady* violation thus has three components under current law: evidence must be favorable to the defense, it must be suppressed, and it must be material. *See Strickler v. Greene*, 527 U.S. 263, 281-82 (1999).

As applied by prosecutors and the lower courts, the *Brady* materiality requirement has robbed the disclosure obligation of much of its force. That requirement has several problems. First, to the extent materiality defines the government's duty of disclosure, it forces prosecutors to anticipate before

trial, and often before they even know the outlines of the defense, whether disclosure of a particular piece of favorable evidence has a "reasonable likelihood" of producing a different outcome. That is a difficult task even for conscientious prosecutors. As one experienced district judge (and former prosecutor) explained:

> Most prosecutors are neither neutral (nor should they be) nor prescient, and any such judgment necessarily is speculative on so many matters that simply are unknown and unknowable before trial begins: which government witnesses will be available for trial, how they will testify and be evaluated by the jury, which objections to testimony and evidence the trial judge will sustain and which he will overrule, what the nature of the defense will be, what witnesses and evidence will support that defense, what instructions the Court ultimately will give, what questions the jury may pose during deliberations (and how they may be answered), and whether the jury finds guilt on all counts or only on some (and which ones).

United States v. Safavian, 233 F.R.D. 12, 16 (D.D.C. 2005) (Friedman, J.). As *Safavian* suggests, both the inherent uncertainty of how the trial will unfold and the tendency of even the most fair-minded prosecutor to view his case as strong and his witnesses as

credible make materiality unworkable as a disclosure standard.[2] Professor Jeffries put the point this way:

> [Prosecutors are] hard-charging, competitive lawyers whose reputations and satisfactions depend on obtaining convictions. To that end, they construct a narrative of the case that aligns the evidence with a verdict of guilty. *Brady* requires not only that zealous prosecutors help the opposition, but that they do so by crediting a version of the evidence at odds with their understanding. Both common sense and cognitive psychology confirm the difficulty of that task.

John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 Va. L. Rev. 207, 228 (2013).

For the unethical or indifferent prosecutor, limiting the *Brady* disclosure obligation to material

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[2] *See, e.g.*, Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 Wm. & Mary L. Rev. 1587, 1593-1613 (2006) (discussing cognitive biases that affect prosecutorial decision-making). The burden that *Brady* places on prosecutors to view the yet-to-be-tried case prospectively contrasts with the other context where the materiality standard is used: ineffective assistance of counsel claims. *See, e.g., Strickland v. Washington*, 466 U.S. 668, 694 (1984) (to establish ineffective assistance, defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"). Ineffective assistance claims are always raised post-trial and are always retrospective. Thus, it makes sense to focus on the effect counsel's substandard performance had on the proceeding. A *Brady* materiality requirement, by contrast, forces prosecutors to anticipate the effect particular evidence would have on a proceeding that has not yet occurred.

evidence is an invitation to withhold, or not search for, favorable evidence based on the prosecutor's asserted perception that the evidence against the defendant is overwhelming. Such a prosecutor has almost no incentive to find and disclose evidence favoring the defense. If he does so, the government's case will be weakened, and the chances of losing (with the resulting professional opprobrium) will increase. If the prosecutor ignores or withholds the evidence, on the other hand, there is a good chance it will never come to light. If the evidence does surface, the prosecutor can always argue that the defendant has not established that it was material. And even if the evidence is ultimately found to be material, the prosecution is no worse off than if it had disclosed the information in the first place; it merely "gets a do-over," with the defense given the benefit of the favorable information. *United States v. Olsen*, 737 F.3d 625, 630 (9th Cir. 2013) (Kozinski, C.J., dissenting from denial of rehearing en banc) ("*Olsen* Dissent").

Nor does the prospect of professional discipline or civil liability provide the necessary incentive for the unethical or indifferent prosecutor to disclose favorable evidence. Professional discipline is virtually nonexistent for prosecutors who commit *Brady* violations,[3] and this Court has made civil suits

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[3] *See, e.g.*, David Keenan, Deborah Jane Cooper, David Lebowitz & Tamar Lerer, *The Myth of Prosecutorial Accountability After* Connick v. Thompson*: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 Yale L.J. Online, Forum (Oct. 25, 2011); John R. Emshwiller and Evan Perez, *Prosecutors Seldom Punished for Misconduct*, Wall Street Journal, Oct. 4, 2010; Joel B. Rudin, *Taking Prosecutorial*

based on *Brady* practically impossible to maintain. *Connick v. Thompson*, 563 U.S. 51 (2011).[4] In short, "A robust and rigorously enforced *Brady* rule is imperative because all the incentives prosecutors confront encourage them not to discover or disclose exculpatory evidence." *Olsen* Dissent, 737 F.3d at 630.

The materiality requirement has proven unworkable on appeal as well as in the pretrial context. This Court has made clear in case after case that materiality should impose only a modest impediment to reversal when the prosecution has suppressed favorable evidence. The defendant need not "demonstrat[e] by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." *Kyles*, 514 U.S. at 434; *see, e.g., Wearry*, 136 S. Ct. at 1006. Nor is the materiality standard a "sufficiency of evidence test. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." *Kyles*, 514 U.S. at 434-35. And the materiality of undisclosed, favorable information must be "considered collectively, not item by item." *Id.* at 436. Under this standard, a defendant can obtain reversal on a *Brady* claim "even if . . . the undisclosed information may not have

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Misconduct 'Unseriously': Brady Violations and The Myth of Professional Accountability, The Champion, Dec. 2012, at 30.

[4] *See, e.g.*, Bidish Sarma, *Using Deterrence Theory to Promote Prosecutorial Accountability*, 21 Lewis & Clark L. Rev. (forthcoming 2017) (discussing the weaknesses in the current modes of prosecutorial accountability) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2909254).

affected the jury's verdict." *Wearry*, 136 S. Ct. at 1006 n.6.

Despite the low threshold this Court has set, appellate courts rarely find suppressed, favorable evidence material under *Brady*. A study undertaken by the National Association of Criminal Defense Lawyers and the Veritas Initiative of the Santa Clara University School of Law confirms this point.[5] An examination of a random sample of 620 federal *Brady* decisions revealed that, out of 145 decisions in which prosecutors were found to have withheld favorable information, the defense prevailed in just 21--14% of the total. Material Indifference at xi, 21, 45.

What accounts for this low reversal rate, given this Court's relaxed materiality standard? Most significantly, the defendant has the burden on appeal of showing that the suppressed evidence was material. *See, e.g., Wearry*, 136 S. Ct. at 1006 (describing what defendant "must show" to establish materiality); *Kyles*, 514 U.S. at 436 (*Brady* materiality standard "impose[s] a higher burden on the defendant" than the *Kotteakos* harmless error standard) (quotation omitted).[6] That can be a difficult burden to meet, given the complex mix of evidence that most trials produce and the difficulty of gleaning

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[5] Kathleen Ridolfi, Tiffany M. Joslyn & Todd H. Fries, *Material Indifference: How Courts Are Impeding Fair Disclosure in Criminal Cases* at xi (NACDL and Veritas Initiative 2014) ["Material Indifference"] (available at https://www.nacdl.org/discoveryreform/materialindifference/).

[6] As discussed below, the materiality requirement differs in this respect from the usual harmless error standard for constitutional violations, which requires the government to establish harmlessness beyond a reasonable doubt.

the dynamics of a trial from a cold record. Moreover, appellate judges have a natural reluctance to overturn a conviction and require a second trial, especially when the judges think the likelihood of a second conviction is substantial.

These two factors--the allocation of the burden on materiality and appellate courts' urge to achieve finality in criminal cases--likely account for the extraordinary affirmance rate that the Material Indifference study reveals. But those routine affirmances carry a significant cost--most obviously in fairness to the defendants involved, but also to the criminal justice system as a whole. As Professor Jeffries correctly observes, "Prosecutors facing this forgiving regime may be expected to skimp on *Brady*, and by all accounts they do."[7]

II. EFFORTS TO MAKE *BRADY* WORKABLE HAVE FAILED.

In 2009, the prosecution of Senator Ted Stevens collapsed following disclosure of massive and systematic *Brady* violations. Senator Stevens' salvation, however, was largely a matter of happenstance. Despite repeated defense claims of *Brady* violations during trial, the prosecution insisted that any nondisclosures were inadvertent and immaterial. The district court expressed concern but declined to impose any meaningful sanction. The jury returned a guilty verdict, and Senator Stevens prepared for prison after a distinguished record of service to his country. Fortuitously, however, a

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[7] Jeffries, *supra*, 99 Va. L. Rev. at 230.

disgruntled FBI agent came forward after the verdict and revealed that the prosecution team had concealed crucial impeachment evidence concerning its star witness. Following that revelation, the case quickly unraveled.[8]

In the wake of the Stevens travesty, there were calls for *Brady* reform from many quarters. The American Bar Association House of Delegates adopted a resolution calling for legislation to codify the prosecutor's duty to provide exculpatory evidence.[9] Major newspapers editorialized in favor of reform.[10] Most significantly, a bipartisan group of Senators introduced the Fairness in Disclosure of Evidence Act of 2012, S. 2197, 112th Cong., 2d Sess. (Mar. 15, 2012), which would have codified the prosecution's duty to produce favorable evidence. These calls for reform had a common theme: they

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[8] For an account of the Stevens prosecution, see Rob Cary, *Not Guilty: The Unlawful Prosecution of U.S. Senator Ted Stevens* (Thompson Reuters 2014). The prosecutors who suppressed favorable evidence in *Stevens* received brief suspensions from DOJ. Even that minimal discipline was later overturned by the Merit Systems Protection Board (which ordered DOJ to pay the prosecutors' legal fees). *Goeke and Bottini v. Department of Justice*, 2015 MSPB 1 (Jan. 2, 2015); *Goeke and Bottini v. Department of Justice*, Docket no. CB-0752-15-0228-A-1 (MSPB Aug. 12, 2016).

[9] American Bar Association Resolution 105D and Report Regarding Disclosure Rules (August 8-9, 2011) ["ABA Resolution"] (available at http://www2.nycbar.org/pdf/ABA105D.pdf).

[10] *E.g.*, New York Times, Editorial, *Justice and Open Files*, Feb. 26, 2012; New York Times, Editorial, *Rampant Prosecutorial Misconduct*, Jan. 4, 2014; Los Angeles Times, Editorial, *Defending the Brady Rule: Reforms Are Needed To Make Sure Prosecutors Share All Evidence That Could Be Helpful To Defendants*, Nov. 21, 2011; Los Angeles Times, Editorial, *Don't Ignore the Brady Rule: Evidence Must Be Shared*, Dec. 29, 2013.

advocated abandoning the *Brady* materiality requirement as a limit on the prosecutor's disclosure duty.

The Department of Justice fiercely resisted these reform efforts, just as it had resisted previous efforts--urged by, among others, the American College of Trial Lawyers--to codify *Brady* without a materiality requirement in Fed. R. Crim. P. 16.[11] DOJ successfully opposed the Fairness in Disclosure of Evidence Act.[12] It touted its own post-*Stevens* reform efforts, most notably through a series of internal memoranda issued January 4, 2010 by then-Deputy Attorney General David Ogden.[13] But the Ogden Memoranda did little to solve the problems that plague *Brady*. They maintained the materiality requirement as a limit on the duty of disclosure, provided defendants with no enforceable rights, *see, e.g., United States v. Mazzarella*, 784 F.3d 532, 541-42 (9th Cir. 2015), and left much to the discretion of local federal prosecutors.[14] And of course the Ogden

[11] For descriptions of DOJ's efforts to thwart reform legislation, see, *e.g.*, ABA Resolution at 3-4; Federal Judicial Center, *A Summary of Responses to a National Survey of Rule 16 Disclosure Practices in Criminal Cases* 3-4 (Feb. 2011).

[12] *See, e.g.*, Hon. Alex Kozinski, *Preface: Criminal Law 2.0*, 44 Geo. L.J. Ann. Rev. Crim. Proc. iii, xxvii (2015) ("Despite support from both Democrats and Republicans, the bill has made no progress toward passage because of steadfast opposition from the U.S. Department of Justice."); Bruce A. Green, *Federal Criminal Discovery Reform: A Legislative Approach*, 64 Mercer L. Rev. 639, 652-55 (2013) (describing proposed Senate legislation and DOJ opposition).

[13] The Ogden Memoranda are available at http://www.justice.gov/dag/mem-orandum-department-prosecutors.

[14] For critiques of the Ogden Memoranda, see, *e.g.*, ABA Resolution at 5-6; Norman L. Reimer, *Federal Discovery Reform:*

Memoranda had no bearing on the practices of state and local prosecutors. Eight years after the *Stevens* debacle, it is clear that efforts to reform *Brady* through legislation are doomed in the face of trenchant DOJ and other prosecutorial resistance.

Judicial efforts to address the problems with the *Brady* materiality component have likewise fallen short. Some federal district courts have held that, in the pretrial context, *Brady* requires production of all favorable evidence, regardless of its materiality.[15] This approach has several weaknesses as matters stand now. First, this Court has at times appeared to limit the government's disclosure obligation to favorable evidence that is material. In *Kyles*, for example, the Court declared that "the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' is reached." *Kyles*, 514 U.S. at 437; *see, e.g., Cone v. Bell*, 556 U.S. 449, 470 (2009) ("[F]avorable evidence is subject to constitutionally mandated disclosure when it could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.") (quotation omitted). The

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DOJ's Baby Steps Are Inadequate, The Champion, March 2010, at 7.

[15] *See, e.g., Safavian*, 233 F.R.D. at 16; *United States v. Carter*, 313 F. Supp. 2d 921, 924-25 (E.D. Wis. 2004); *United States v. Sudikoff*, 36 F. Supp. 2d 1196, 1198-99 (C.D. Cal. 1999); *see also United States v. Olsen*, 704 F.3d 1172, 1183 n.3 (9th Cir. 2013) (adopting this position in dictum). *But see United States v. Causey*, 356 F. Supp. 2d 681, 696 (S.D. Texas 2005) (declining to adopt this approach); *Boyd v. United States*, 908 A.2d 39, 59-61 (D.C. 2006) (same).

district court decisions requiring pretrial disclosure without regard to materiality stand in some tension with the Court's language in *Kyles*, *Cone*, and other cases.[16]

Recognizing this problem, at least one district court eschewed *Brady* as a basis for requiring pretrial disclosure of all favorable evidence and relied instead on the prosecutor's ethical obligations. *See United States v. Acosta*, 357 F. Supp. 2d 1228 (D. Nev. 2005); *see also* American Bar Association, Model Rules of Professional Conduct, Rule 3.8(d) (prosecutor's disclosure duty extends to all favorable evidence). The *Acosta* approach does not solve the materiality problem, however, because it is subject to state-by-state variations in the ethical rules governing the prosecutor's disclosure obligation, and, in the view of some courts, those rules may not provide a basis for ordering discovery. Similarly, some federal district courts have adopted local rules that require disclosure of favorable evidence, regardless of its potential effect on the outcome of the trial.[17] But this approach too leaves significant gaps, because local rules vary from

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[16] The quoted language from *Kyles* and *Cone* may well be dictum. *See, e.g.*, Janet C. Hoeffel & Stephen I. Singer, *Activating A* Brady *Pretrial Duty to Disclose Favorable Information: From the Mouths of Supreme Court Justices to Practice*, 38 N.Y.U. Rev. L. & Soc. Change 467, 469-73 (2014). Nonetheless, most prosecutors and courts treat it as establishing the scope of the prosecutor's disclosure duty.

[17] *E.g.*, Local Rules, United States District Court, Southern District of Alabama, Criminal L.R. 16(b)(1)(B); Local Rules, United States District Court, Northern District of Florida, Rule 26.2(D)(1)-(3); Local Rules of the United States District Court for the District of Massachusetts, Rule 116.2.

district to district and in any event have no bearing on the practices of state and local prosecutors.

Apart from the problems outlined above, the district court decisions requiring pretrial disclosure of all favorable evidence do not address the obstacle that the materiality requirement presents on appeal. Even if materiality is viewed solely as a form of harmless error doctrine, inapplicable in the pretrial context, it still permits appellate courts to reject *Brady* claims and affirm convictions whenever the defendant cannot establish that disclosure would have created a reasonable probability of a different outcome. Contrary to the evident intent of *Wearry*, *Kyles*, and other cases, this burden has proven unduly difficult for defendants to meet, as demonstrated in the Material Indifference study.

Some appellate judges have expressed dismay at the feeble enforcement of *Brady* caused by an overly strict reading of the materiality requirement. Most notably, then-Ninth Circuit Chief Judge Kozinski declared in 2013, "There is an epidemic of *Brady* violations abroad in the land. Only judges can put a stop to it." *Olsen* Dissent, 737 F.3d at 626. A year later, Seventh Circuit Chief Judge Wood lamented, "One would think that by now failures to comply with [*Brady*] would be rare. But *Brady* issues continue to arise. Often, non-disclosure comes at no price for prosecutors, because courts find that the withheld evidence would not have created a 'reasonable probability of a different result.'" *United States v. Morales*, 746 F.3d 310, 311 (7th Cir. 2014) (quoting *Kyles*, 514 U.S. at 434). But these occasional expressions of appellate dismay have had little effect.

In *Olsen* itself, for example, Judge Kozinski attracted the votes of only four of his colleagues, and rehearing en banc was denied. And in *Morales* the court of appeals found the suppressed evidence not material, despite the court's concerns about prosecutorial impunity. *Id.* at 315-18. As this case demonstrates (and as the Material Indifference study confirms), appellate courts continue to rely on an overly strict interpretation of the materiality requirement to affirm the overwhelming majority of convictions even where prosecutors suppress favorable evidence.

Neither Congress nor the lower courts have been able to solve the problems that the *Brady* materiality requirement presents. The solution lies with this Court.

III. THE COURT SHOULD CLARIFY THAT THE PROSECUTOR HAS A DUTY TO DISCLOSE ALL FAVORABLE EVIDENCE AND APPLY THE *CHAPMAN* HARMLESS ERROR STANDARD TO VIOLATIONS OF THAT DUTY.

For the reasons outlined in petitioners' briefs, the Court can and should reverse the judgment below based on the materiality standard outlined in *Wearry* and *Kyles*. But the Court should also take the opportunity to clarify and strengthen *Brady*'s fairness mandate. In particular, the Court should hold that the government violates the defendant's right to due process when it suppresses favorable evidence, regardless of the potential effect of that evidence on the outcome of a future trial.

On appeal, the Court should abandon the current materiality standard and instead require reversal of the conviction for failure to disclose favorable evidence unless the government can establish that the error is harmless beyond a reasonable doubt. We address the trial-level and harmless error standards in turn.

A. The Prosecutor's Pretrial Disclosure Obligation.

Requiring production of all favorable evidence solves the problem that prosecutors face in administering the current materiality standard. Prosecutors will no longer have to predict whether particular pieces of favorable evidence, viewed cumulatively, have a reasonable probability of affecting the outcome of the trial. If the evidence is favorable, it will have to be produced. Prosecutors will have little difficulty recognizing "favorable" evidence. *Any* evidence that tends to negate one of the elements of the offense, to establish an affirmative defense, or to impeach a prosecution witness is favorable.[18]

This approach aligns with the interpretation some district courts have given *Brady* in the pretrial

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[18] A strong argument can be made that the Constitution requires disclosure of *all* relevant evidence to a criminal defendant, whether favorable or not, subject only to limits based on a showing of good cause (such as witness protection). Such an "open file" rule would satisfy due process (provided the "file" encompassed all relevant material in the hands of the police, as well as the prosecutors, and included impeachment material, *see, e.g., Smith v. Secretary*, 50 F.3d 801, 828 (10th Cir. 1995)), and it would go a long way toward ensuring fairness and eliminating the "sporting theory" of criminal justice.

context. *See supra* at 14 & n.15. It also corresponds to views expressed at oral argument by some Members of the Court about how *Brady* should work in practice. In *Smith v. Cain*, No. 10-8145, the state sought to defend its nondisclosure of favorable evidence on the ground that the evidence was not material. *E.g.*, Oral Argument T. at 29 (Nov. 8, 2011). Several Justices appeared to distinguish between the prosecutor's duty to disclose and the standard for reversal on appeal. Justice Kennedy, for example, declared:

> And with all respect, I think you misspoke when you--you were asked what is--what is the test for when Brady material must be turned over. And you said whether or not there's a reasonable probability . . . that the result would have been different. That's the test for when there has been a Brady violation. You don't determine your Brady obligation by the test for the Brady violation. You're transposing two very different things.

Id. at 48-49. Justice Ginsburg added, "There was a prior inconsistent statement. Shouldn't that be the end of it? A prior inconsistent statement, one that is favorable to the defense, has to be turned over, period. I thought was what Brady requires." *Id.* at 51. Justice Scalia suggested that the state "stop fighting as to whether it should be turned over[.] Of course it should have been turned over. I think the case you're making is that it wouldn't have made a difference. . . . And--and that's a closer case, perhaps, but surely it

should have been turned over. Why don't you give that up?" *Id.* at 51-52. Justice Sotomayor observed, "I said there were two prongs to Brady. Do you have to turn it over, and, second, does it cause harm. And the first one you said not. That--it is somewhat disconcerting that your office is still answering unequivocally on a basic obligation as one that requires you to have turned these materials over . . . whether it caused harm or not." *Id.* at 53; *see also Wearry*, 136 S. Ct. at 1008 (Alito, J., dissenting) ("There is no question in my mind that the prosecution should have disclosed this information, but whether the information was sufficient to warrant reversing petitioner's conviction is another matter.").[19]

Questions and statements during oral argument, of course, do not bind the Court or individual Justices. But the observations quoted above reflect a crucial distinction--not clearly expressed in the Court's decisions--between the prosecutor's duty to disclose favorable evidence on one hand and the consequences of a breach of that duty on the other. The Court should clarify that the *Brady* obligation corresponds to the understanding expressed in the *Smith* argument: prosecutors must disclose all favorable evidence, regardless of the prejudice, or lack of prejudice, that nondisclosure might cause the defense.

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[19] Because the suppressed evidence in *Smith* "plainly" met the materiality standard, the Court did not have occasion to address the prosecutor's pretrial duty to disclose favorable evidence regardless of its materiality. *Smith v. Cain*, 565 U.S. 73, 76 (2012).

B. Harmless Error.

Once the duty of disclosure is clarified, the Court should determine the proper harmless error standard for violations of that duty. It could retain materiality for that purpose (although not as a component of the constitutional duty itself). But this approach would leave the practical effect of *Brady* largely unchanged. Appellate courts would continue to excuse the vast majority of *Brady* violations, and prosecutors would take that forgiving attitude into account in deciding what to disclose. Instead, having defined the constitutional violation as the suppression of favorable evidence, the Court should apply the ordinary constitutional harmless error standard: the conviction will be reversed unless the government can establish that the failure to disclose was "harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967); *see, e.g., Arizona v. Fulminante*, 499 U.S. 279, 295 (1991).[20]

This settled standard affords substantial protection to the due process right that *Brady* recognized, while avoiding reversals "for small errors or defects that have little, if any, likelihood of having changed the result of the trial." 386 U.S. at 22. The stringent *Chapman* harmless error standard will give prosecutors a far stronger incentive than they have now to take seriously their disclosure obligations.

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[20] On habeas review of state convictions, the Court would presumably apply the harmless error standard of *Brecht v. Abrahamson*, 507 U.S. 619 (1993), to *Brady* claims, as it does to other constitutional claims. As *Kyles* makes clear, even the *Brecht* harmless error standard is more protective of the constitutional right at issue than the *Brady* materiality standard. *Kyles*, 514 U.S. at 435-36.

And it will avoid results such as occurred here, where the government indisputably suppressed favorable evidence, but lower courts nonetheless upheld the convictions because they concluded (erroneously, as petitioners demonstrate in their briefs) that the defendants had not established that the suppressed evidence was material. If the burden were placed instead on the prosecution to show harmlessness beyond a reasonable doubt, as it is for most other constitutional violations, cases such as this would be far more easily resolved in favor of a new trial.

CONCLUSION

The judgment of the District of Columbia Court of Appeals should be reversed.

Respectfully submitted,

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